SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 256

CADDO PARISH SCHOOL BOARD, ET AL.,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondents,

• • •

No._____

THE BOSSIER PARISH SCHOOL BOARD, ET AL.,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondents,

• • •

No._____

JACKSON PARISH SCHOOL BOARD, ET AL.,
Petitioners,

versus

MARGARET M. JOHNSON, ET AL.,
Respondents,

• • •

No._____

CLAIBORNE PARISH SCHOOL BOARD, ET AL.,
Petitioners,

versus

YVORNIA DECAROL BANKS, ET AL.,
Respondents,

• • •

No._____

CITY OF MONROE, LOUISIANA, ET AL.,
Petitioners,

versus

JIMMY ANDREWS, ET AL.,
Respondents.

• • •

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

• • •

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

OPINIONS BELOW

The orders of the District Courts below are printed in Exhibits, A, B, C, D and E[1] and the original opinion of the United States Court of Appeals for the Fifth Circuit found in Vol. VIII on pages 17-169 and 172-173. The opinion on Rehearing is found on pages 244-327 of Volume VIII of the transcript of record.[2]

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was rendered and entered on December 29, 1966 and is contained in transcript of record, Vol. VIII, pp. 174-179. Application for rehearing was made and the same was granted on February 9, 1967, Vol. VIII, pp. 237-239. The Court later allowed oral argument on the said re-

[1]Caddo, transcript Vol. 1, pp. 291-298; 303-304, Exhibit A; Bossier, transcript Vol. 3, pp. 251-258, 261-262, Exhibit B; Jackson, transcript Vol. 4, pp. 47-52, Exhibit C; Claiborne, transcript Vol. 5, pp. 45-52, Exhibit D; Monroe, transcript Vol. 6, pp. 63-69, Exhibit E.

[2]The original opinion and opinion on rehearing of the Fifth Circuit are printed as Exhibit L.

hearing, Vol. VIII, pp. 240-242. On March 29, 1967 the Court issued an opinion affirming and slightly modifying the original opinion, transcript of record, Vol. VIII, pp. 244-327 and issued its judgment in accordance therewith, Vol. VIII, pp, 328-333.[3]

The jurisdiction of this Court is envoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I. Does the "equal protection" clause of the Fourteenth Amendment place upon school officials the affirmative duty to correct racial imbalance resulting from innocent school administration or voluntary choice?

II. If the "equal protection" clause of the Fourteenth Amendment requires racial balancing as indicated by the decision of the court herein, does this requirement apply nationally or only sectionally?

III. Does a non-desegregated faculty per se violate constitutional rights of students or is such a situation one that requires proof of the denial of equal protection?

IV. If a non-desegregated faculty is constitutionally impermissible, does the Constitution require a racial balancing of the faculty, with the burden of accomplishing the same on school administrators?

V. Does national policy as established by congressional action require or support the decision in this case?

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[3]For reference to original opinion and opinion on rehearing see footnote 1.

VI. Can rules established by Congress or by administrative fiat, for the purpose of qualifying for federal funds become basic minimal constitutional standards?

VII. Does the decree issued by the Fifth Circuit violate the express mandate issued by this Court, requiring the District Court to fashion the remedy in each case according to the circumstances and conditions prevailing?

VIII. Does the Brown decree allowing the court to retain jurisdiction permit the federal courts to experiment with school systems under its decrees, or is the retention of said jurisdiction limited to approving a method for desegregation?

CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES INVOLVED

Amendment XIV, Section 1 of the Constitution of the United States.

"AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS: EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction "thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due proc-

ess of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Inferentially, the Civil Rights Act of 1964 is closely interwoven, therefore, the pertinent provisions thereof will be found printed in Exhibit G.

STATEMENT OF THE CASE

Petitioners are five Louisiana School Boards and officers thereof, charged under the laws of the State with the duty of operating the schools within their jurisdiction.[4] Each of the school systems had been enjoined from discriminating with regard to school attendance or school assignment. Each of the systems were in the progress of desegregating pursuant to plans approved by the District Court.

In the summer and fall of 1965 the United States District Court for the Western District of Louisiana approved a plan for each of the school districts.[5] Each of these plans provided for complete desegregation of each and every grade by the commencement of the 1967-68 school year. Each of the plans approved consisted basically of a freedom of choice available to each student subject to certain administrative restrictions not racially motivated. The original plaintiffs and/or the United States, appearing as intervenor, appealed each order, apparently feeling that the plans left too much of school administration to the school boards and that a

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[4]All of the boards operate schools with their respective Parishes (Counties) except the Monroe School System which encompasses only a part of a parish.

[5]Caddo, August 3, 1965, tr. Vol. I, pp. 291-298, 303-304; Bossier, August 20, 1965, tr. Vol. III, pp. 251-258, 261-262; Jackson, October 27, 1965, tr. Vol. IV, pp. 47-52; Claiborne, October 11, 1965, tr. Vol. V, pp. 45-52; Monroe, November 2, 1965, tr. Vol. VI, pp. 63-69.

valid plan should spell out as nearly as possible the solution to all questions as well as they very language of communications between the schools and the students.

It is important to note that the administration of the approved plan was not attacked at that time or at any date up to the present date.

On December 29, 1966, the United States Court of Appeals for the Fifth Circuit in a 2 - 1 decision, issued an opinion and a decree from which your petitioners applied for rehearing. A rehearing was granted and on March 10, 1967, the Court en banc heard oral argument thereon. On March 29, 1967, said Court of Appeals in an 8 - 1 - 3 decision rendered an opinion adopting with clarifying statements the opinion of December 29, 1966, and with minor changes to the decree of December 29, 1966. The Court further stated that the mandate would issue immediately.

Applications for a stay pending application for certiorari was made to the United States Court of Appeals for the Fifth Circuit as well as to this Court,[6] both of which were denied.

I.

DOES THE "EQUAL PROTECTION" CLAUSE OF FOURTEENTH AMENDMENT PLACE UPON SCHOOL OFFICIALS THE AFFIRMATIVE DUTY TO CORRECT RACIAL IMBALANCE RESULTING FROM INNOCENT SCHOOL ADMINISTRATION OR VOLUNTARY CHOICE?

Again this Court is presented the opportunity to determine whether the Fourteenth Amendment demands af-

[6] See Exhibit K.

firmative action on behalf of school officials to eliminate racial imbalance.[7] The only difference between this and earlier cases is the side of the coin involved. Here the decision of the Court of Appeals finds that such a duty exists where the others rejected it.

The attitude of this issue as it reaches the Court is clearly spelled out in the original decision of the Fifth Circuit and the opinion on rehearing. For purposes of clarity they will be referred to hereinafter as Jefferson I and Jefferson II.

The "meat of the coconut" is succulently set out in the opinions.

> "The only school desegregation plan that meets constitutional standards is one that works. * * *" Jefferson I, P. 7.

The determinative factor in a workable plan is the proported duty of the school board to :

> "disestablish dual, racially segregated school systems and to achieve substantial integration within such systems." Jefferson I, P. 115.

If the racial mixing does not occur then the school board must proceed as follows:

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[7]This issue was directly presented to this Court in *Bell v. School City of Gary*, cert. denied 377 U.S. 924 (1965). Questions presented:

I. Does the Fourteenth Amendment require a school board, which administers a compulsory public school system wherein virtually all the Negro students are confined to schools that are totally or predominantly Negro and virtually all the white students are confined to schools that are totally or predominantly white, to take steps, consistent with sound and rational education administration, to remedy that situation?

II. May a school board, consistent with requirements of equal educational opportunities mandated by the Fourteenth Amendment, acquiesce in the existence of a segregated or racially imbalanced school system which it administers?

> "If school officials in any district should find that their district still has segregated faculties and schools or only token integration, their affirmative duty to take corrective action requires them to try an alternative to a freedom of choice plan, such as geographic attendance plan, a combination of the two, the Princeton plan, or some other acceptable substitute, perhaps aided by an educational park. Freedom of choice is not a key that opens all doors to equal educational opporunities." Jefferson I, P. 115.

1. The Court sitting en banc adopts the the opinion and decree filed in these cases December 29, 1966, subject to the clarifying statements in this opinion and the changes in the decree attached to this opinion. Jefferson II, P. 4.

The Court holds that boards and officials administering public schools in this circuit have the affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system in which there are no Negro schools and no white schools — just schools. Expressions in our earlier opinions distinguishing between integration and desegregation must yield to this affirmative duty we now recognize. In fulfilling this duty it is not enough for school authorities to offer Negro children the opportunity to attend formerly all-white schools. The necessity of overcoming the effects of the dual school system in this circuit requires integration of faculties, facilities, and activities, as well as students. To the extent that earlier decisions of this Court (more in the language of the opinion than in the effect of the holding) conflict with this view, the decisions are overruled. Jefferson II, P. 5.

While the Court has not, as of this date, established any fixed percentage or formula by which to determine when a plan works, the lack of a standard does not alter the principle. Some standard, yet to be established, must be met or desegregation has not occurred and the school officials must concoct a new system to achieve the required "integration".

5. The percentages referred in to the Guidelines and in this Court's decree are simply a rough rule of thumb for measuring the effectiveness of freedom of choice as a useful tool. The percentages are not a method for setting quotas or striking a balance. If the plan is ineffective, longer on promises than performance, the school officials charged with initiating and administering a unitary system have not met the constitutional requirements of the Fourteenth Amendment; they should try other tools. Jefferson II, p. 6.

Despite a disclaimer insofar as racial balancing is concerned, the result is the elimination of racial imbalance regardless of the name placed on it.

Numerous circuits of the United States have had the opportunity to pass on the question of the duty to eliminate racial imbalance not purposefully created.

The first class of cases deals with situations where students are involuntarily assigned to schools because of geographic zones established by school officials. Where the plaintiffs have been unable to show bad intentions on the part of the school officials this adventitious or innocent racial imbalance has been held to be constitutionally permissible.

In the First Circuit the Court overruled a decision of the district court which ordered the school board to correct innocent racial imbalance.

> "Certain statements in the opinion, notably that 'there must be no segregated schools,' suggest an absolute right in the plaintiffs to have what the court found to be "tantamount to segregation" removed at all costs. We can accept no such constitutional right. Cf. *Bell v. School City of Gary*, 7 Cir., 1963, 324 F.2d 209, cert. den. 377 U.S. 924, 84 S.Ct. 1223, 12 L.Ed.2d 216; *Downs v. Board of Education*, 10 Cir., 1964, 336 F.2d 988, cert. den. 380 U.S. 914, 85 S.Ct. 898, 13 L.Ed.2d 800." *Springfield School Committee v. Barksdale*, 348 F.2d 261, 264 (1965).

The Third Circuit when confronted with a desegregation plan used the terms "desegregation" and "integration" interchangably as does the majority opinion herein; however, qualified its understanding of the term as follows.

> "Eventually a wholly integrated school system will be effected for Delaware: 'wholly integrated' in the sense that all school children, whether white or Negro, whose attendance at school is required by law at public schools, 14 Del.C. Section 2702, will attend public schools without regard for race or color" *Evans v. Ennis*, 281 F.2d 385, 391 (1960).

This was further amplified when the Court found that its language had been interpreted to mean mandatory mixing.

> "It was not our intention, nor is it our intention now, to exempt the respective individual

infant plaintiffs who may presently actively seek integration from the usual processing of the school system relating to their capabilities, scholastic attainments and geographical locations, provided always that that processing is conducted on a racially non-discriminatory basis. Such processing must, of course, be applied to all children in a well regulated public school system." *Evans v. Ennis*, 281 F.2d 385, at page 395 (1960).

When the question of racial imbalance was raised before the Fourth Circuit the Court disposed of the question in the following manner.

"On this phase of the case, the principal complaint of the plaintiffs appears to be that the zoning of the schools has not produced a greater mixture of the races than it has. There are still some all white schools; there are still some all Negro schools, and, though the number of those have been declining, there is no reason to think that some of them will not remain in the school year 1966-1967. The plaintiffs contend the lines should have been drawn with the conscious purpose of eliminating as many of such schools as possible and of achieving a maximum intermixture of the races.

Whatever the Board may do in response to its own initiative or that of the community, we have held that there is no constitutional requirement that it act with the conscious purpose of achieving the maximum mixture of races in the school population. The Constitution permits the Board to consider natural geographic boundaries, accessibility of particular schools and many other factors which are unrelated to race. So long as the boundaries are not

> drawn for the purpose of maintaining racial segregation, the School Board is under no constitutional requirement that it effectively and completely counteract all of the effects of seggregated housing patterns." *Swann v. Charlotte-Mecklenburg Board of Ed.*, 369 F.2d 29, 32 (1966).

When presented with the identical racial imbalance question the Sixth Circuit followed the main stream of judicial expression when it held.

> "Here, if there are obstacles or restrictions imposed on the ability of a Negro to take advantage of all the choices offered by the school system, they stem from his individual economic plight, or result from private, not school, prejudice. We read *Brown* as prohibiting only enforced segregation.
>
> * * * *
>
> We hold that there is no constitutional duty on the part of the Board to bus Negro or white children out of their neighborhoods or to transfer classes for the sole purpose of alleviating racial imbalance that it did not cause nor is there a like duty to select new school sites solely in furtherance of such a purpose." *Deal v. Cincinnati Board of Ed.*, 369 F.2d 55, 60 (1966).

In addition to the circuits enumerated above the Seventh and Tenth Circuits have, when faced with identical legal questions, disclaimed the concept of the constitutional duty to eliminate or reduce racial balance innocently conceived.

> "The situation in *Brown* is a far cry from

the situation existing in Gary, Indiana. The School District boundaries in Gary were determined without any consideration of race or color. We agree with the argument of the defendants stated as 'there is no affirmative U. S. Constitutional duty to change innocently arrived at school attendance districts by the mere fact that shifts in population either increase or decrease the percentage of either Negro or white pupils.'

After the original opinion in *Brown v. Board of Education*, supra, the Court set the case for further argument on the question of how its decision should be implemented. Thereafter, a three-judge district court was designated in Kansas to consider the Kansas aspects of the instructions in the *Brown* case. That Court stated, *Brown v. Board of Education*, D.C., 139 F.Supp. 468, 470, "Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color."

In *Briggs v. Elliott* (EDSC), 132 F.Supp. 776, 777, the Court said: 'The Constitution, in other words, does not require integration. It merely forbids discrimination.'" *Bell v. School City of Gary*, 324 F.2d 209, 213, (7th Cir., 1963) (cert. denied 377 U.S. 924 (1965).

"Appellants also contend that even though the Board may not be pursuing a policy of intentional segregation, there is still segregation in fact in the school system and under the principles of *Brown v. Board of Education*, supra, the Board has a positive and affirmative duty to eliminate segregation in fact as well as segregation by intention. While there

seems to be authority to support that contention, the better rule is that although the Fourteenth Amendment prohibits segregation, it does not command integration of the races in the public schools and Negro children have no constitutional right to have white children attend school with them. *Kelley v. Board of Education of City of Nashville*, supra; *Stell v. Savannah-Chatham County Board of Education*, 5 Cir., 333 F.2d 55; *Evers v. Jackson Municipal Separate School District*, 5 Cir., 328 F.2d 408; *Boson v. Rippy*, 5 Cir., 285 F.2d 43; *Holland v. Board of Public Instruction*, 5 Cir., 258 F.2d 730; *Avery v. Wichita Falls Independent School District*, 5 Cir., 241 F.2d 230, cert. denied, 353 U.S. 938, 77 S.Ct. 816, 1 L.Ed2d 761; *Bradley v. School Board of City of Richmond, Virginia*, 4 Cir. 317 F.2d 429; *Jeffers v. Whitley*, 4 Cir., 309 F.2d 621.

Moreover, the question was conclusively answered in *Bell v. School City of Gary, Indiana*, 7 Cir., 324 F.2d 209, 213, cert. denied, 377 U.S. 924, 84 S.Ct. 1223, 12 L.Ed.2d 216, where the court held that * * * "'there is no affirmative U. S. Constitutional duty to change innocently arrived at school attendance districts by the mere fact that shifts in population either increase or decrease the percentage of either Negro or white pupils.'" *Downes v. Bd. of Ed. of Kansas City*, 336 F.2d 988, 998, (10th Cir. 1964).

Each of the six circuits obviously have found no constitutional duty to eliminate racial imbalance where innocently conceived.[8] In each of these cases the imbal-

[8]Other cases have taken steps to eliminate racial imbalance where the same resulted from gerrymandered attendance zones or other purposeful, bad faith actions. *Clemons v. Bd. of Ed.*, 228 F.2d 853 (6th Cir.) cert. denied; 350 U.S. 1006 (1956); *Taylor v. Board of Education* 294 F.2d 36 (2nd Cir.) cert. denied 368 U.S. 940 (1961); *Dowell v. Bd. of Ed. of Oklahoma City*, Jan. 1967 (10th Cir.).

ance, even though innocently conceived, was maintained by action of school officials in adherence to geographic zone lines.

A freedom of choice plan such as those in operation in the school systems involved herein permits the greatest exercise of individual choice without artificial restrictions. This was recognized by the Sixth Circuit.

> "The principle thus established in our law is that the state may not erect irrelevant barriers to restrict the full play of individual choice in any sector of society. Since it is freedom of choice that is to be protected, it is not necessary that any particular harm be established if it is shown that the range of individual options had been constricted without the high degree of justification which the Constitution requires. It is harm enough that a citizen is arbitrarily denied choices open to his fellows." *Deal v. Cincinnati Bd. of Ed.*, 369 F.2d 55, 59 (1966).

Two circuits have passed directly on the constitutionality of a freedom of choice plan honestly administered, absent a provision for elimination of racial imbalance. Both have held that a freedom of choice plan administered in good faith, and which results in voluntary racial imbalance is nevertheless constitutionally permissible. The Eighth Circuit in December of 1966 found that the constitutionality of a freedom of choice plan is determined by the good faith implementation of such a plan and not by the number of students who avail themselves of the right of choice under the plan.

> "Though the Board has a positive duty to initiate a plan of desegregation, the constitution-

> ality of that plan does not necessarily depend upon favorable statistics indicating positive integration of the races. The Constitution prohibits segregation of the races, the operation of a school sysetm with dual attendance zones based upon race, and assignment of students on the basis of race to particular schools. If all of the students are, in fact, given a free and unhindered choice of schools, which is honored by the school board, it cannot be said that the state is segregating the races, operating a school with dual attendance areas or considering race in the assignment of students to their classrooms. We find no unlawful discrimination in the giving of students a free choice of schools. The system is not subject to constitutional objections simply because large segments of whites and Negroes choose to continue attending their familiar schools. It is true that statistics on actual integration may tend to prove that an otherwise constitutional system is not being constitutionally operated. However, these statistics certainly do not conclusively prove the unconstitutionality of the system itself." *Clark v. Bd. of Ed. of Little Rock*, 369 F.2d 661, 666.

A prior decision out of the Fourth Circuit reached the same conclusion. In that opinion that Court stated:

> "It has been held again and again, however, that the Fourteenth Amendment prohibition is not against segregation as such. The proscription is against discrimination. Everyone of every race has a right to be free of discrimination by the state by reason of his race. There is nothing in the Constitution which prevents his voluntary association with others of his race or which would strike down any state law which permits such association. The present

suggestion that a Negro's right to be free from discrimination requires that the state deprive him of his volition is incongruous.

The phrase from the second *Brown* decision to which the plaintiffs refer lends no support to their contention. The first paragraph of the opinion, in which the phrase appears, clearly and precisely expresses the proscription against 'discrimination'. There is no hint of a suggestion of a constitutional requirement that a state must forbid voluntary associations or limit an individual's freedom of choice except to the extent that each individual's freedom of choice may be affected by the equal right of others. A state or a school district offends no constitutional requirements when it grants to all students uniformly an unrestricted freedom of choice as to schools attended, so that each pupil in effect, assigns himself to the school he wishes to attend.

* * *

* * * As we clearly stated in *Jeffers v. Whitley*, 309 F.2d 621, 629 (4th Cir. 1962), the appellants are not entitled to an order requiring the defendants to effect *a general intermixture of the races in the schools* but they are entitled to an order enjoining the defendants from refusing admission to any school of any pupil *because of the pupil's race.* * * *" *Bradley v. School Bd. of Richmond*, 345 F.2d 310 (1965), reversed on other grounds 382 U.S. 103.

The rationale adopted by these various circuits are certainly not in conflict with decisions of this Court, but to the contrary, are completely harmonious therewith.[9]

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[9]*Brown v. Bd. of Education* I, 347 U.S. 843, 98 L.Ed. 873, 74 S.Ct. 686 (1954); *Brown v. Bd. of Education* II, 349 U.S. 294, 99 L.Ed. 1083, 75 S.Ct. 753 (1955); *Cooper v. Aaron*, 558 U.S. 1, 3 L.Ed.2d 5, 78 S.Ct. 1401 (1958); *Goss v. Bd. of Education*, 373 U.S. 683, 10 L.Ed.2d, 632, 83 S.Ct. 1405 (1963).

II.

IF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES RACIAL BALANCING AS INDICATED BY THE DECISION OF THE COURT HEREIN, DOES THIS REQUIREMENT APPLY NATIONALLY OR ONLY SECTIONALLY?

"The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this county, shall abide "*in any state*' on an equality of legal privileges with all citizens under nondiscriminatory laws." *Tahahashi .v. Fish Comm'n*, 420, U. S. 410, 420 (1948); 68 S. C. 1138, 92 L. Ed. 1478.

The Equal Protection Clause of the Fourteenth Amendment prohibits "any State" from denying any person within its jurisdiction the equal protection of the laws. The Equal Protection Clause does not specify only certain states or certain sections as being subject to its provisions, it applies to all states of the Union. It is axiomatic that if the right to have public schools racially balanced exists under the Equal Protection Clause in one state, it exists in all the states of the Union.

"Equal protection of the laws means that the rights of all persons must rest upon the same rule under the same circumstances . . . The guiding principle most often stated by the courts is that the constitutional guarantee of equal protection of the laws requires that all persons shall be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." 16 Am. Juris. 2d Sec. 487, pp. 848-849.

"The concept of equal protection has been traditionally viewed as requiring the *uniform treatment* of persons

standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation *regardless of where they live* . . . The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote . . . The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens *of all places* as well as of all races." *Reynolds v. Sims*, 377 U. S. 533, 84 S. Ct. 1362, 1383, 1384, 1385. 12 L. Ed. 2d 506.

There is an analogy between the reasoning employed in *Reynolds v. Sims*, quoted above, and the question at issue. If the equal protectoin clause demands uniform treatment with respect to legislative representation regardless of where the citizen lives, it must also demand uniform treatment of all citizens, regardless of where they live, with respect to educational opportunity.

The citizen in Cincinnati, Ohio, Gary, Indiana, Kansas City, Missouri and Little Rock, Arkansas should have neither a greater nor a lesser right to equal educational opportunity under the Fourteenth Amendment than the citizen of Monroe, Shreveport or Bossier Parish, Louisiana. Yet merely because Cincinnati, Gary, Kansas City, and Little Rock happen to be located in federal circuits which hold that the Equal Protection Clause does not require racial balancing, their citizens receive treatment with respect to educational opportunity under the Equal Protection Clause which is different from the citizens of Monroe, Shreveport, and Bossier Parish.

If a citizen moved from Cincinnati to Shreveport, would his educational rights under the Equal Protection Clause change because Shreveport happens to be located in a different federal circuit which holds that racial balancing is required?

"The equal protection clause is not concerned with desires to perpetuate political philosophies, geographical entities, historical anomolies. It is equally and impartially unconcerned with the protection of *any* minority, save one: the minority of one embodied in the individual citizen." *Butterworth v. Dempsey*, 229 F. Supp. 754, 763 (1964) aff'd 84 S. Ct. 1913 (1964); 378 U. S. 562, 12 L. Ed. 2d 1036.

Nevertheless, because of the conflicting decisions of the Fifth and Sixth Circuits on the requirement of racial balance under the equal protection clause, the irrelevant circumstance of traveling from Cincinnati to Shreveport would substantially change the individual citizen's educational rights under the Equal Protection Clause.

Obviously, this is an anomoly which should be resolved by this Court, which has always treated as self-evident the proposition that the Equal Protection Clause knows no state or sectional boundaries, but applies uniformly throughout the Nation. A right to equal treatment existing anywhere, exists everywhere in the Nation. A right to have public schools racially balanced, if such exists within the Equal Protection Clause, exists not only in one section of this country but throughout the entire land.

Justices Black and Douglas, dissenting in *South v.*

Peters, 339 U. S. 276, 279, 70 S. C. 641, 94 L. Ed. 834, stated: "The creation by law of favored groups of citizens and the grant to them of preferred political rights is the worst of all discriminations under a democratic form of government."

The conflict between the decisions of the First, Third, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits, on the one hand, and the decision of the Fifth Circuit, on the other, with reference to the necessity of racial balancing under the Equal Protection Clause, has created privileged groups of citizens in one section of this Nation, while denying the same privilege to the citizens of other sections of the Nation. Such discrimination, in the name of "equal protection" is the antithesis of equal protection and should be corrected by this Court.

One of the traditional functions of the Supreme Court is to resolve and accommodate diversities and conflicts occurring among the courts of the eleven federal circuits. *Charles Dowd Box Co. v. Courtney*, 368 U. S. 502, 82 S. Ct. 519 (1962), 7 L. Ed. 2d 483.

The resolution of such conflicts as a traditional function of the Court is embodied in Supreme Court Rule 19(b), which states in pertinent part:

> "Rule 19. Considerations Governing Review on Certiorari
>
> * * *
>
> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter. . . ."

The following is a list of some of the more recent cases wherein the Supreme Court has granted certiorari to settle a conflict on the point at issue among the Circuit Courts of Appeals:

U. S. v. Union Cent. Life Ins. Co., 82 S. Ct. 349, 368 U. S. 291 (1961), 7 L. Ed. 2d 294 (Conflict on question of filing requirements for federal tax liens;

U. S. v. O'Malley, 383 U. S. 627, 86 S. Ct. 1123 (1966), 16 L. Ed. 2d 145 (Conflict on question of taxability of trust property);

U. S. v. Muniz, 374 U. S. 150, 83 S. Ct. 1850 (1963), 10 L. Ed. 2d 805 (Conflict in construction of Federal Tort Claims Act);

C. I. R. v. Lester, 366 U. S. 299, 81 S. Ct. 1343 (1961), 6 L. Ed. 2d 306 (Conflict on question of agreement in divorce action as affecting support payments of children);

Knetch v. U. S. 364, U. S. 361, 81 S. Ct. 132 (1960), 5 L. Ed. 2d 128 (Conflict on interest deductions under Internal Revenue Code);

Nicholas v. United States, 384 U. S. 678, 86 S. Ct. 1674 (1966), 16 L. Ed. 2d 853 (Conflict on question of liability of superseding trustee in bankruptcy for interest and penalties on federal taxes);

Sinclair Refining Co. v. Atkinson, 370 U. S. 195, 82 S. Ct. 1328 (1962), 8 L. Ed. 2d 440 (Conflict on labor law question under Taft-Hartley Act);

Perry v. Commerce Loan Co., 383 U. S. 392, 86 S. Ct. 852 (1966), 15 L. Ed. 2d 827 (Conflict

on question whether confirmation of wage-earner extension-of-time plan is barred by discharge in bankruptcy);

Maysonet Guzman v. Ruiz Pichirlo, 369 U. S. 698, 82 S. Ct. 1095 (1962), 8 L. Ed. 2d 205 (Conflict on question of liability of vessel for longshoreman's injuries);

Segal v. Rochelle, 382 U. S. 375, 86 S. Ct. 511 (1966), 15 L. Ed. 2d 428 (Conflict on question of bankruptcy administration).

The question of requiring racial balance in the case at bar, which is the subject of conflict between the Fifth Circuit and the First, Third, Fourth, Sixth, Seventh, Eighth, and Tenth Circuit Courts of Appeal is of grave importance to this Nation and involves a matter which, at the very least, is of equal significance with any matter deemed worthy of consideration by this Court in order to resolve a conflict among the circuits.

III.

DOES A NON-DESEGREGATED FACULTY PER SE VIOLATE CONSTITUTIONAL RIGHTS OF STUDENTS OR IS SUCH A SITUATION ONE THAT REQUIRES PROOF OF THE DENIAL OF EQUAL PROTECTION?

The decree issued by the Court of Appeals apparently holds that as a matter of law a non-desegregated faculty denies equal protection of the laws to the plaintiffs and their class.[10] The Court arrived at this assumption without any evidence in the record to support or reject it. There is no doubt, since the Brown decision, that

[10]Jefferson II, pp. 18-21.

student classification based on race is per se unconstitutional; however, this Court has held in two prior cases that evidence must be taken on the question of teacher assignment.

> "The petitions for writs of certiorari to the Court of Appeals for the Fourth Circuit are granted for the purpose of deciding whether it is proper to approve school desegregation plans without considering, at a full evidentiary hearing, the impact on those plans of faculty allocation on an alleged racial basis. We hold that the Court of Appeals erred in both these cases in this regard, 345 F. 2d 310, 319-321; 345 F 2d 325, 328.
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> * * *
>
> We hold that petitioners were entitled to such full evidentiary hearings upon their contention. There is no merit to the suggestion that the relation between faculty allocation on an alleged racial basis and the adequacy of the desegregation plans is entirely speculative." *Bradley v. School Board, City of Richmond, Va.*, 382 U. S. 103, 86 S. Ct. 224, 15 L. Ed. 2d 187.

> "From the outset of these proceedings petitioners have challenged an alleged policy of respondents of allocating faculty on a racial basis. The District Court took the view that petitioners were without standing to challenge the alleged policy, and accordingly refused to permit any inquiry into the matter. The Court of Appeals sustained this ruling, holding that only students presently in desegregated grades would have the standing to make that challenge. 345 F. 2d. 117, 125. We do not agree and remand for a prompt evidentiary hearing on this issue." *Rogers v. Paul*, 382 U. S. 198, 200; 86 S. Ct. 360, 15 L. Ed. 2d 265.

If this Court is to be consistent, it should vacate the decision of the Court of Appeals and remand the cases to the district court for the taking of evidence.

IV.

IF A NON-DESEGREGATED FACULTY IS CONSTITUTIONALLY IMPERMISSIBLE, DOES THE CONSTITUTION REQUIRE A RACIAL BALANCING OF THE FACULTY, WITH THE BURDEN OF ACCOMPLSHING THE SAME ON SCHOOL ADMINISTRATORS?

The decree contemplates that each school board must take into consideration the race of all teachers and assign them in such a manner that no school in the system has a faculty of one race.[11] In addition, the school authorities shall make assignments with the objective of achieving a racial balance among the faculty.[12]

Assignment on such a basis would constitute a mandatory racial classification of all teachers and staff personnel with employment, assignment and transfers being predicated on the racial classificatoin. Such a race conscious system certainly is not a minimal constitutional requirement. As a matter of fact, such a policy itself constitutes discrimination. *Hughes v. Superior Court*, 339 U. S. 460, S. Ct. 718 (1950), 94 L. Ed. 985.

Even the legislative body of government has determined that employment preference based on race is not an appropriate device.

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[11]Jefferson II, p. 9.
[12]Jefferson II, p. 19.

Civil Rights Act of 1964, Title VII:

"Sec. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin . . ."

Classifications based on race are "odius to a free people", *Korematsa v. U.S., (1944)* 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194.

V.

DOES NATIONAL POLICY AS ESTABLISHED BY BY CONGRESSIONAL ACTION REQUIRE OR SUPPORT THE DECISION IN THIS CASE?

Ordinarily, when determining constitutional requirements, discussion of national policy, congressional intention and administrative dictates would be irrelevant. Be that as it may, the decision of Jefferson I, by its very language, is inextricably woven into the Civil Rights Act of 1964[13] and the H. E. W. 1966 Guidelines.[14]

The only school desegregation plan that meets constitutional standards is one that works. By helping public schools to meet that test, by assisting the courts in their independent evaluation of school desegregation plans, and by accelerating the progress but simplifying the progress of desegregation the HEW Guidelines offer new hope to Negro school children long denied their constitutional rights. A national effort, bringing together Congress, the executive, and the judiciary may be able to make meaningful the right of Negro children to equal educational opportunities. The courts acting alone have failed.

Jefferson I, p. 7.

". . . and are intended by Congress and the executive to be part of a cooordinated national program."

Jefferson I, p. 8.

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[13]Pertinent provisions of Civil Rights Act of 1964 are contained in Exhibit G.

[14]H. E. W. 1966 Guidelines are contained in Exhibit I.

". . . Because of the second consequence of our decisions and because of our duty to cooperate with Congress and with the executive in enforcing Congressional objectives, strong policy considerations support our holding that the standards of court-supervised desegregation should not be lower than the standards of HEW-supervised desegregation. . . ."

Jefferson I, p. 9.

". . . We have taken a close look at the background and objectives of the Civil Rights Act of 1964."

Jefferson I, p. 10.

". . . The Civil Rights Act of 1964 and the HEW Guidelines are belated but invaluable helps in arriving at a neutral, principled decision consistent with the dimensions of the problem, traditional judicial functions, and the United States Constitution.

Jefferson I, pp. 11-12.

". . . Titles IV and VI together constitute the congressional alternative to court-supervised desegregation. These sections of the law mobilize in aid of desegregation the United States Office of Education and the Nation's purse."

Jefferson I, pp. 12-13.

". . . Congress speaks as the Voice of the Nation. The national policy is plain: formerly de jure segregated public school systems based on dual attendance zones must shift to unitary, nonracial systems — with

or without federal funds."

Jefferson I, p. 14.

". . . The HEW Guidelines are "minimum standards", representing for the most part standards the Supreme Court and this Court established before the Guidelines were promulgated. Again we hold, "we attach great weight" to the Guidelines. *Singleton v. Jackson Municipal Separate School District*, 5 Cir. 1965, 348 F.2d 729 *(Singleton I)*. "We put these standards to work. . . . [Plans] should be modeled after the Commissioner of Education's requirements. . . ."

". . . We consider it to be in the best interest of all concerned that School Boards meet the minimum standards of the Office of Education. . . ."

Jefferson I, p. 17.

". . . [T]he courts should endeavor to model their standards after those promulgated by the executive. . . ."

Jefferson I, p. 18.

". . . For this circuit, the HEW Guidelines offer, for the first time, the prospect that the transition from a dejure segregated dual system to a unitary integrated system may be carried out effectively, promptly, and

in an orderly manner.

* * *

"We read Title VI as a congressional mandate for change — change in pace and method of enforcing desegregation. . . ."

Jefferson I, p. 19.

". . . When Congress declares national policy, the duty the two other coordinate branches owe to the Nation requires that, within the law, the judiciary and the executive respect and carry out that policy.

Jefferson I, p. 27.

"C. We must therefore cooperate with Congress and the Executive in enforcing Title VI. The problem is: Are the HEW Guidelines within the scope of the congressional and executive policies embodied in the Civil Rights Act of 1964. We hold that they are."

Jefferson I, p. 29.

"The national importance of the HEW Guidelines the evident thoroughness with which these standards were prepared and formulated by educational authorities, the similarity of the HEW standards to the standards this Court and the Supreme Court have established, and the manifest effort of the Office of Education to be faithful to the congressional objectives of the 1964 Civil

Rights Act entitle the HEW Guidelines to greater weight by the courts than run-of-the-mine policy statements low in the hierarchy of administrative declarations.

Courts therefore should cooperate with the congressional-executive policy in favor of desegregation and against aiding segregated schools."

Jefferson I, p. 32.

"We shall not permit the courts to be used to destroy or dilute the effectiveness of the congressional policy expressed in Title VI. There is no bonus for foot-dragging."

Jefferson I, p. 35.

"F. We summarize the Court's policy as one of encouraging the maximum legally permissible correlation between judicial standards for school desegregation and HEW Guidelines. This policy may be applied without federal courts' abdicating their proper judicial function. The policy complies with the Supreme Court's increasing emphasis on more speed and less deliberation in school desegregation. It is consistent with the judiciary's duty to the Nation to cooperate with the two other coordinate branches of government in carrying out the national policy expressed in the Civil Rights Act of 1964."

Jefferson I, p. 38.

Despite eloquent protestations to the contrary, neither the legislative history of the Civil Rights Act of 1964, the Act itself, nor subsequent congressional legislation supports the doctrine which requires affirmative elimination of racial imbalance.

Excerpts from the Congressional Record set forth in Exhibit F, which contain statements of the floor leader with reference to the interest of the act, are replete with statements which disallow any attempt to require anything more than elimination of assignment on basis of race.

The Act itself disclaims, in specific, unmistakable language any attempt to require elimination of racial imbalance.

"(b) 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

Civil Rights Act 1964, Title IV, Sec. 401(b).

". . . provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial imbalance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial imbalance, or otherwise

enlarge the existing power of the court to insure compliance with constitutional standards. . . ."

Civil Rights Act 1964, Title IV, Sec. 407(a).

This congressional statement of policy is further stated and implemented in the Aid to Education Bills of 1965-1966.[15]

The Civil Rights Act of 1964 provided that the appropriate agency would have the right to cut off federal funds for any program operating in a non-desegregated manner.[16] The agency that is responsible for allocation of the funds for educational purposes is the Department of Health, Education and Welfare. The legislative history clearly shows that Title VI was to be read in the light of the definition of desegregation contained in Title IV of the Act.[17] To further eliminate the possibility of irresponsible administrative action Congress provided that any rules or regulations were to be approved by the President prior to it becoming effective.[18]

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[15]See pertinent excerpts in Aid to Education Acts, Exhibit H.

[16]Title VI of the Civil Rights Act of 1964.

[17]See Exhibit E.

[18]Civil Rights Act of 1964, Title VI, Section 602; See Exhibit G.

These rules when adopted were to be applied nationally and equally.[19]

How have the H.E.W. Guidelines, relied on extensively by the Court for its direction, complied with the requisites established by Congress? — Requirements of the 1966 Guidelines apply only to certain states in the Union. Quota systems to balance student bodies and faculties are not applied to situations where so called "de facto" segregation exist. The Guidelines have never been approved by the President even though, pursuant to said Guidelines, payment of funds has been suspended. The Guidelines are administered without regard to the admonition in the act with regard to racial balancing.[20]

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[19]Legislative history clearly supports the idea that no distinction should be made with respect to the various states in dealing with the problem. Senator Pastore was one of the principal spokesmen who handled this legislation. He gave the following explanation:

> "Frankly I do not see how we could have gone any further, to be fair . . . Section 602 of Title VI, not only requires the agency to promulgate rules and regulations, but all procedure must be in accord with these rules and regulations. They must have broad scope. They must be national. They must apply to all fifty states. We could not draw one rule to apply to the State of Mississippi, another rule to apply to the State of Alabama, and another rule to apply to the State of Rhode Island. There must be only one rule, to apply to every state. Further, the President must approve the rule." (110 Cong. Rec. 7059, April 7, 1964).
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> * * *
>
> "MR. PASTORE . . . We must do what Title VI provides; and we could do it in no milder form than that now provided by Title VI. The Senator from Tennessee says, 'Let us read this title'. I say so, too. When we read these two pages, we understand that the whole philosophy of Title VI is to promote voluntary compliance. It is written right in the law. There shall be the voluntary compliance as the first step, and then the second step they must inaugurate and promulgate, rules that have a national effect, not a local effect. They shall apply to Tennessee, to Louisiana, to Rhode Island, in equal fashion." (110 Cong. Rec. 7066, April 7, 1964).

[20]See deposition of Director in charge of Louisiana, Exhibit J.

The affect of these H.E.W. Guidelines is to place the administration of each school system on a "Procrustean Couch" tailoring it to, not constitutional limits, but administrative dictates.

VI.

CAN RULES ESTABLISHED BY CONGRESS OR BY ADMINISTRATIVE FIAT, FOR THE PURPOSE OF QUALIFYING FOR FEDERAL FUNDS, BECOME BASIC MINIMAL CONSTITUTIONAL STANDARDS?

The opinion in Jefferson I placed great stress on the idea that there should be little difference between the H.E.W. Guidelines of 1966 and the constitutional minimum standards. Discussion of the difference between the right to establish rules to withhold funds and that of regulation of a practice is obvious only by its absence.[21] This distinction was well recognized and discussed by Senator Humphrey.

> "Title VI is also not an interference in any sense with private business and individual rights. It does not confer any new Federal authority; it merely states how the authority conferred by other laws is to be administered. It is not a regulatory measure, but an exercise of the unquestioned power of the Federal Government to 'fix the terms on which Federal funds shall be disbursed.'"

110 Cong. Rec. Vol. 5, p. 6546.

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[21]This failure is more pointed when it is realized that not all of the school boards involved accepted federal educational funds (City of Monroe).

Judge Bell in his dissent recognized the difference when he stated:

> The theory of the court escape route and the necessity to hold all guidelines valid is apparently developed in the interest of supporting the national policy, as expressed in the Civil Rights Act of 1964, of eliminating discrimination in public education. The general theme of the majority is that HEW has the carrot in the form of federal funds but no stick. A stick is needed in those situations where a school board may not take federal funds. The aim is to make a stick out of the federal courts. The courts should cooperate with HEW but they cannot be made to play the part of any stick that HEW may formulate and this is the tenor of the original opinion.
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> Jefferson II, p. 66.

The adoption of fund requirements[22] as minimal standards is novel in the annals of law.

> "In constructing the original and revised decrees, the Court gave great weight to the 1965 and 1966 HEW Guidelines. These Guidelines establish minimum standards clearly applicable to disestablishing state-sanctioned segregation. These Guidelines and our decree are within the decisions of this Court, comply with the letter and spirit of the Civil Rights Act of 1964, and

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[22]It should be noted that the Court of Appeals held H.E.W. Guidelines to be valid and within the scope of the Civil Rights Act despite the fact that the issue was not before the Court.

meet the requirements of the United States Constitution."

Jefferson II, p. 7.

Affirmation of any such doctrine, considering the hundreds of areas where funds are granted pursuant to administrative rule, would in effect turn over legislative and judicial fuctions to the whims of administrative agencies.

The Courts, and not an administrative agency, such as HEW, should interpret the Constitution and determine questions of constitutional law.

> "Most emphatically, the courts are generally the experts, as compared with agencies, on many types of issues, and this fact alone is freqeuntly a sufficient reason for substitution of judicial for administrative judgment on problems of applying legal concepts to established facts. The courts, not the agencies, are comparatively the experts in many areas, including constiutional law, common law, ethics, overall philosophy of law and government, judge-made law developed through statutory interpretation, most analysis of legislative history, and problems transcending the particular field of the agency."

Davis, Administrative Law Treatise, Volume 4, Sec. 30.09 (main volume), Sec. 30.06 (supplement); see also Davis, Administrative Law, (1965 edition) p. 390 (West Publishing Co.); Parker Administrative Law (Bobbs-Merrill 1952) pp. 265-266; Vom Baur, Federal Administrative Law, Vol. 1, Sec. 449 (Callaghan 1942).

The determination of constitutional questions represents the highest exercise of Judicial power:

> "It has been held that an administrative agency invested with discretion has no jurisdiction to entertain constitutional questions." *Panity v. District of Col.* 112 F. 2d 39, 42,

The rule-making power of an administrative agency, such as HEW, being subject to the limitations of the federal constitution, cannot extend to the interpretation or modification of the federal constitution. *Anti Fascist Committee v. McGrath*, 341 U. S. 123; *D. C. v. Little*, 178 F. 2d 13, aff'd 339 U.S. 1; *Crowell v. Benson*, 285 U. S. 22, 60; 1 Am. Jur. 2d Admin. Law Secs. 72, 132, 133; Parker, Administrative Law, pp. 152, 167 (Bobbs-Merrill 1952); Vom Baur, Federal Administrative Law, Vol. 1, Sec. 77 (Callaghan 1942).

VII.

DOES THE DECREE ISSUED BY THE FIFTH CIRCUIT VIOLATE THE EXPRESS MANDATE ISSUED BY THIS COURT, REQUIRING THE DISTRICT COURT TO FASHION THE REMEDY IN EACH CASE ACCORDING TO THE CIRCUMSTANCES AND CONDITIONS PREVAILING?

This Court in establishing the desegregation doctrine in Brown recognized that conditions would vary extensively from state to state and within the states themselves. Accordingly, it permitted the district judge to determine whether the plan submitted by the school board was sufficient to accomplish desegregation within the system involved.

> "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for

elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.

"In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Brown v. Topeka*, 349 U.S. 294, 299, 75 S.Ct. 753, 99 L.Ed. 1083.

The uniform decree issued by the Fifth Circuit in this case completely subverts the doctrine of flexibility and requires each district court to issue a uniform, stero-type decree. The rigid and flexible decree encompasses in it many provisions which might better be left to the discretion of the court and many requirements which appear to have no basis for application as minimal constitutional standards.

There appears to be no constitutional reason why each student should have to make an annual choice,[23] why the choice should have to be made in a specific on month period,[24] why each student or parent should not be required to make a choice,[25] or why a student in the Ninth grade or over fifteen years of age is in a position to

[23]Jefferson II, Decree II(b), p. 9.
[24]Jefferson II, Decree II(c), p. 9.
[25]Jefferson II, Decree II(d), p. 9.

choose without the necessity of parental consent.[26] The necessity for the letter and choice forms to be mailed by first class mail rather than delivered by some equally effective manner and the necessity that the same be in the language chosen by the court seems to be equally unnecessary.[27]

Why should a child be denied continually a preference for school previously attended and granted a preference solely on geographic distance when same may result in yearly involuntary school re-assignment?[28] Does the constitution require that the court route buses,[29] determine which schools should be closed,[30] decide who should be afforded remedial educational programs,[31] and where school buildings should be located?[32] Certainly these mandatory requirements, in addition to others, unnecessarily constrict discretion of the district courts.

VIII.

DOES THE BROWN DECREE ALLOWING THE COURT TO RETAIN JURISDICTION PERMIT THE FEDERAL COURTS TO EXPERIMENT WITH SCHOOL SYSTEMS UNDER ITS DECREES, OR IS THE RETENTION OF SAID JURISDICTION LIMITED TO APPROVNG A METHOD OF DESEGREGATION?

The decision of Brown proportedly granted to the district court the duty of passing on plans for desegregation. The opinion and degree issued herein have opened "Pandora's Box" by permitting the court the

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[26]Jefferson II, Decree II(a), p. 8.
[27]Jefferson II, Decree II(e) & (f), p. 9.
[28]Jefferson II, Decree II(l), p. 12.
[29]Jefferson II, Decree II(n), p. 13.
[30]Jefferson II, Decree VI(a), p. 17.
[31]Jefferson II, Decree VI(b), p. 17.
[32]Jefferson II, Decree VII, p. 18.

right to tell the school board not what is constitutionally permissible, but what is good, better or best. School attendance not based on color can be achieved without the necessity of an "Educational Park", "Princeton Plan" or other device recommended by experimental planners. Absent discrimination on the basis of race, the operation of the school system must constitutionally and practically be left in the hands of local school officials. Neither the court nor the federal administrative agencies are in a position to efficiently and effectively operate the schools. Uniformity, and compulsory adherence to experimental education are within the discretion of local officials to adopt, but must not and cannot be a constitutional requirement.

CONCLUSION

The opinion and decree of the court below requiring assignment by race and racial balancing of both faculty and students is contrary to the jurisprudence of this Court and of numerous circuits within this country. The results of this doctrine is to "force feed" a certain section of the country with a diet, unpalatable and unprescribed for the balance of the nation. Constitutional principles must be applied on a national basis. Punitive sectionalism cannot endure. The purpose of permitting the courts to devise plans under the Brown decision was to grant time to adjust school systems to a new decision regarding rights, but was not an invitation to conduct social innovation. Unless the decision of the majority is overruled, the school districts in this circuit

will be relegated to a test tube in the laboratory of admininstrative social experimentation.

Respectfully submitted,

JACK P. F. GREMILLION
Attorney General
State of Louisiana

WILLIAM P. SCHULER
Second Assistant
Attorney General

JOHN A. RICHARDSON
District Attorney
First Judicial District
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Second Judicial District
Homer, Louisiana

ALBIN B. LASSITER
District Attorney
Fourth Judicial District
Monroe, Louisiana

LOUIS H. PADGETT, JR.
District Attorney
Twenty-Second Judicial District
Bossier City, Louisiana

CERTIFICATE OF SERVICE

I, William P. Schuler, a member of the Bar of the United States Supreme Court, do hereby certify that a copy of the foregoing Petition for Writ of Certiorari to the United States Fifth Circuit Court of Appeals has been served on all opposing counsel of record in accordance with law and the rules of the United States Supreme Court by depositing the same in the United States mail with first class postage prepaid, addressed to each counsel of record at his post office address.

New Orleans, Louisiana, this _____day of _____, 1967.

_____

WILLIAM P. SCHULER

PLEASE SERVE:

VIA AIR MAIL
Hon. John Doar
Assistant Attorney General
Department of Justice
Washington, D. C. 20530

VIA AIR MAIL
Hon. David L. Norman
Assistant Attorney General
Department of Justice
Washington, D. C. 20530

VIA AIR MAIL
Mr. Norman Amaker
10 Columbus Circle
New York, New York

Mr. Alvin J. Bronstein
603 N. Farish Street
Jackson, Mississippi

Mr. Richard B. Sobol
2209 Dryades Street
New Orleans, Louisiana

Mr. A. P. Tureaud
1821 Orleans Avenue
New Orleans, Louisiana

EXHIBIT "A"

ORDER ON PLAN FOR DESEGREGATION

Respondent, Caddo Parish School Board, pursuant to this Court's order of June 14, 1965, has presented to the Court a proposed plan for desegregation of the Caddo Parish school system. The plaintiffs have presented their objections thereto.

Now, after due consideration of the proposed plan submitted by respondents, and the objections thereto presented by plaintiffs, and after having taken into consideration the local problems inherent in any attempt to desegregate the public schools in Caddo Parish, as well as prior pronouncements of the United States Supreme Court, and of the United States Court of Appeals for the Fifth Circuit, by which pronouncements this Court is bound:

It is ordered that the following plan for the orderly desegregation and control of the Caddo Parish School Board be, and it is hereby approved and adopted:

1. All initial pupil assignments made for the school year 1965-66 will be considered adequate, subject however to the following transfer provisions:

   (a) The Caddo Parish School Board will, not later than August 5, 1965, cause to be published in The Shreveport Times for three (3) consecutive days, a notice to persons responsible for pupils eligible to enter the first and twelfth grades, advising said persons that applications

for assignment to the first and twelfth grades of any school under its jurisdiction may be made in person at the Caddo Parish School Board Office from *August 9*, 1965, to *August 13*, 1965.

(b) Such transfers will be made in accordance with the procedures pertaining to transfers currently in general use by the Caddo Parish School Board.

(c) Application form for transfers or assignments will be made available, upon request, by the School Board to all students and parents affected, and complete, detailed instructions as to procedures will be furnished with the applications.

(d) Transfers or assignments, when requested, shall not be unreasonably denied. No denial of a request for transfer or assignment shall be based on race or color. However, in determining whether or not a request for transfer or assignment shall be granted, the School Board, in considering the application for transfer or assignment, may consider the following factors as proper criteria to be applied in granting or denying the request for transfer or assignment:

(1) The desire or wishes of the pupil and his parents or guardian.

(2) Availability of space and other facilities in the school to which the transfer or assignment is requested.

(3) The age of the pupil as compared with

the ages of pupils already attending the school to which transfer is requested.

(4) The availability of requested or desired courses of study in the school to which the transfer is requested.

(5) In the event a transfer or assignment is requested to a particular school, but it develops that there is available space in another school, in all respects comparable to the one to which transfer or assignment is requested, closer to the applicant's residence, the School Board may, if it deems it advisable, make the transfer or assignment to the comparable school closest to the pupil's residence, rather than to the school to which the transfer or assignment was requested.

(6) No pupil will be granted more than one transfer in any one school year, except under special circumstances found justifiable by the School Board.

(7) No request for transfer or assignment may be denied solely on the grounds of technical errors or omissions made by the applicant or his parents or guardian in the preparation of the application for transfer or assignment.

(8) Any new students, entering the school system for the first time, regardless of grade, shall be entitled to assignment according to their choice to the former all white school or

former all Negro school closest to their place of residence.

(e) All pupils requesting transfer or assignment in accordance herewith shall be notified in writing by the School Board of action taken on their requests for transfer or assignment not later than *August 26*, 1965. If such notification is to the effect that the requested transfer or assignment has been denied, specific reasons for such denial shall be clearly set forth in the notification of rejection.

2. Commencing with the school year 1966-1967 all initial assignments of pupils to the first, second, eleventh and twelfth grades in all schools under the supervision and control of the Caddo Parish School Board shall be made purely and simply on the basis of individual choice, reserving to all pupils, however, the right to apply for transfer in accordance with the procedures hereinabove established, and reserving to the School Board through its authorized representatives, the right to place a pupil in a comparable school other than the school of his choice should there be a comparable school closer to the pupil's residence than is the school of his choice.

3. In each succeeding school year this planned desegregation shall progress to that all grades shall be included by September 1968. Dual school districts on racial lines shall be abolished contemporaneously with the application of this plan to the respective grades when and as reached by the application of this plan.

4. The method of initial assignment herein provided for will, of course, be subject to all reasonable procedural requirements that may be adopted and promulgated by the Caddo Parish School Board.

5. Nothing contained in this order shall be construed to prevent the separation of boys and girls in any school or grade, or to prevent the assignment of boys and girls to separate schools.

6. If any paragraph of these rules and procedures shall be held by any court of competent jurisdiction to be invalid for any reason, the remainder of such rules and procedures shall continue in full force and effect.

IT IS FURTHER ORDERED that respondents herein, and their successors in office, their agents, servants, representatives, or employees, and all other persons whomsoever acting in concert with any and all of such persons, are hereby permanently enjoined from doing anything calculated to obstruct or interfere with the orderly administration of this plan for effecting the transition of the schools hereinabove mentioned to a racially non-discriminatory basis.

Jurisdiction of this matter is retained for the entry of any further orders hereafter deemed necessary in the premises.

SIGNED this *3rd* day of August, 1965, at Shreveport, Louisiana.

(S) Ben C. Dawkins, Jr.
CHIEF JUDGE

AMENDED ORDER ON PLAN FOR DESEGREGATION

Considering the Motion to Vacate and prayer for reconsideration made by plaintiffs herein, in light of the ruling entered by the United States Court of Appeals for the Fifth Circuit on August 17th, 1965, in the matter entitled *United States of America v. Bossier Parish School Board, et al.*, ____ F. 2d ____, No. 22863 on the docket of that Court; and,

Having given full reconsideration to this matter in the light of that ruling and to all other matters presented herein;

It is now hereby ORDERED AND DECREED:

1. That the Caddo Parish School Board, beginning Fall 1965, shall desegregate Grades Two and Eleven, in addition to Grades One and Twelve, as heretofore ordered; that beginning Fall 1966 said School Board shall desegregate Grades Three, Four, Nine and Ten; and beginning Fall 1967 said School Board shall desegregate Grades Five, Six, Seven and Eight, thus completing the entire desegregation process by Fall 1967;

2. That, in keeping herewith, said School Board shall advertise in *The Shreveport Times* on August 20, 21 and 22, 1965, that beginning on August 23rd, and continuing through 5:00 P. M. on August 25th, all students, regardless of race or color, presently assigned for the school year 1965-66 to the Second and Eleventh Grades of any school under its jurisdiction, may apply in person, at the School Board Office, accompanied by parents or guardian, for

transfer and reassignment to the Second or Eleventh Grade of another school of their choice;

3. That said School Board shall notify any such applicants of its action of accepting or rejecting such applications on August 27th, 1965;

4. That, otherwise, all of the terms and conditions of the original order of August 3rd, 1965, are hereby reinstated and shall remain in full force and effect.

5. This Amended Order confirms the verbal order entered on August 19th, 1965.

THUS DONE AND SIGNED, in Chambers, at Shreveport, Louisiana, on this 20th day of August, 1965, *nunc pro tunc* to August 19th, 1965.

(S) Ben C. Dawkins, Jr.
CHIEF JUDGE

Filed: August 20, 1965

EXHIBIT "B"

ORDER ON PLAN FOR DESEGREGATION

Respondent, Bossier Parish School Board, pursuant to this Court's order of April 13, 1965, has presented to the Court a proposed plan for desegregation of the Bossier Parish School system. The plaintiffs and intervenor have presented their objections thereto.

Now, after due consideration of the proposed plan submitted by respondents, and the objections thereto presented by plaintiffs and intervenor, and after having taken into consideration the local problems inherent in any attempt to desegregate the public schools in Bossier Parish, as well as prior pronouncements of the United States Supreme Court, and of the United States Court of Appeals for the Fifth Circuit, by which pronouncements this Court is bound:

IT IS ORDERED that the following plan for the orderly desegregation of the schools under the supervision and control of the Bossier Parish School Board be, and it is hereby approved and adopted:

1. All initial pupil assignments made for the school year 1965-1966 will be considered adequate, subject however to the following transfer provisions:

(a) The Bossier Parish School Board will not later than *August 2*, 1965, mail notices to all students, regardless of race or color, presently assigned for the school year 1965-1966, to the twelfth grade of any school under its jurisdiction, advising them that they may, from *August 9*,

1965, to *August 13, 1965*, apply in person, accompanied by parents or guardian, for transfer and reassignment to the twelfth grade of another school of their choice.

(b) Such transfers will be made in accordance with the procedures pertaining to transfers currently in general use by the Bossier Parish School Board.

(c) The Bossier Parish School Board will, not later than *August 2*, 1965, cause to be published in The Shreveport Times for three (3) consecutive days, a notice to persons responsible for pupils eligible to enter the first grade, advising said persons that applications for assignment to the first grade of any school under its jurisdiction may be made in person at the Bossier Parish School Board Office from *August 16*, 1965, to *August 20*, 1965.

(d) Application forms for transfers or assignments will be made available, upon request, by the School Board to all students and parents affected, and complete, detailed instructions as to procedures will be furnished with the applications.

(e) Transfers or assignments, when requested, shall not be unreasonably denied. No denial of a request for transfer or assignment shall be based on race or color. However, in determining whether or not a request for transfer or assignment shall be granted, the School Board, in considering the application for transfer or assignment, may consider the following factors as proper criteria to

be applied in granting or denying the request for transfer or assignment.

(1) The desire or wishes of the pupil and his parents or guardian.

(2) Availability of space and other facilities in the school to which the transfer or assignment is requested.

(3) The age of the pupil as compared with the ages of pupils already attending the school to which transfer is requested.

(4) The availability of requested or desired courses of study in the school to which the transfer is requested.

(5) In the event a transfer or assignment is requested to a particular school, but it develops that there is available space in another school, in all respects comparable to the one to which transfer or assignment is requested, closer to the applicant's residence, the School Board may, if it deems it advisable, make the transfer or assignment to the comparable school closest to the pupil's residence rather than to the school to which the transfer or assignment was requested.

(6) No pupil will be granted more than one transfer in any school year, except under special circumstances found justifiable by the School Board.

(7) No request for transfer or assignment may be denied solely on the grounds of technical errors or omissions made by the applicant or his parents or guardian in the preparation of the application for transfer or assignment.

(8) Any new students, entering the school system for the first time, regardless of grade, shall be entitled to assignment according to their choice to the former all white school or former all Negro school closest to their place of residence.

(f) All pupils requesting transfer or assignment in accordance herewith shall be notified in writing by the School Board of action taken on their requests for transfer or assignment not later than *August 27*, 1965. If such notification is to the effect that the requested transfer or assignment has been denied, specific reasons for such denial shall be clearly set forth in the notification of rejection.

2. Commencing with the school year 1966-67 all initial assignments of pupils to the first, second, eleventh and twelfth grades in all schools under the supervision and control of the Bossier Parish School Board shall be made purely and simply on the basis of individual choice, reserving to all pupils, however, the right to apply for transfer in accordance with the procedures hereinabove established, and reserving to the School Board through its authorized representatives, the right to place a pupil in a comparable school

other than the school of his choice should there be a comparable school closer to the pupil's residence than is the school of his choice.

3. In each succeeding school year this planned desegregation shall progress so that all grades shall be included by September 1968. Dual school districts on racial lines shall be abolished contemporaneously with the application of this plan to the respective grades when and as reached by the application of this plan.

4. The method of intial assignment herein provided for will, of course, be subject to all reasonable procedural requirements that may be adopted and promulgated by the Bossier Parish School Board.

5. Nothing contained in this order shall be construed to prevent the separation of boys and girls in any school or grade, or to prevent the assignment of boys and girls to separate schools.

6. If any paragraph of these rules and procedures shall be held by any court of competent jurisdiction to be invalid for any reason, the remainder of such rules and procedures shall continue in full force and effect.

IT IS FURTHER ORDERED that respondents herein, and their successors in office, their agents, servants, representatives, or employees, and all other persons whomsoever acting in concert with any and all of such persons, are hereby permanently enjoined from doing anything calculated to obstruct or interfere with the orderly

administration of this plan for effecting the transition of the schools hereinabove mentioned to a racially non-discriminatory basis.

Jurisdiction of this matter is retained for the entry of any further orders hereafter deemed necessary in the premises.

SIGNED this *28th* day of *July*, 1965, at Shreveport, Louisiana.

/s/ Ben C. Dawkins, Jr.

CHIEF JUDGE

AMENDED ORDER ON PLAN FOR DESEGREGATION

This Court having been ordered, by the United States Court of Appeals for the Fifth Circuit, on August 17th, 1965, to reconsider its original "Order on Plan for Desegregation," entered herein on July 28th, 1965, in the light of *Singleton v. Jackson Municip l Separate School District, et al*, _____ F. 2d _____, No. 22527, decided by that Court on June 22nd, 1965, and *Price v. Denison Independent School District Board of Education*, _____ F. 2d _____, No. 21672, decided by that Court on July 2, 1965; and,

Having followed such order and having given full reconsideration to this matter in its entirety:

It is now hereby ORDERED AND DECREED:

1. That the Bossier Parish School Board, beginning

Fall 1965, shall desegregate Grades Two and Eleven, in addition to Grades One and Twelve, as heretofore ordered; that beginning Fall 1966 said Board shall desegregate Grades Three, Four, Nine and Ten; and beginning Fall 1967 said School Board shall desegregate Grades Five, Six, Seven and Eight, thus completing the entire desegregation process by Fall 1967;

2. That, in keeping herewith, said School Board shall advertise in *The Shreveport Times* on August 20, 21, and 22, 1965, that beginning on August 23rd, and continuing through 5:00 P.M. on August 25th, all students, regardless of race or color, presently assigned for the school year 1965-66 to the Second and Eleventh Grades of any school under its jurisdiction, may apply in person, at the School Board Office, accompanied by parents or guardian, for transfer and reassignment to the Second or Eleventh Grade of another school of their choice;

3. That said School Board shall notify any such applicants of its action of accepting or rejecting such applications on August 27th, 1965;

4. That, otherwise, all of the terms and conditions of the original order of July 28th, 1965, are hereby reinstated and shall remain in full force and effect.

5. This Amended Order confirms the verbal order entered on August 19th, 1965.

THUS DONE AND SIGNED, in Chambers, at Shreveport, Louisiana, on this 20th day of August, 1965, *nunc pro tunc* to August 19th, 1965.

/s/ Ben C. Dawkins, Jr.

CHIEF JUDGE

Exhibit "C"

ORDER ON PLAN FOR DESEGREGATION

(Number and title omitted) (Filed: October 11, 1965)

Respondent, Claiborne Parish School Board, pursuant to this Court's Order of August 27, 1965, has presented to the Court a proposed plan for desegregation of the Claiborne Parish School System. The plaintiffs have presented their objections thereto.

Now, after due consideration of the proposed plan submitted by respondent and the objections thereto presented by plaintiffs, and after taking into consideration the local problems inherent in any attempt to desegregate the public schools in Claiborne Parish, as well as prior pronouncements of the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit, by which pronouncements this Court is bound:

IT IS ORDERED that the following plan for the orderly desegregation of the schools under the supervision and control of the Claiborne Parish School Board be, and it is hereby, approved and adopted:

1. All initial pupil assignments made for the school year 1965-1966 will be considered adequate, subject however to the following transfer provisions:

   (a) The Claiborne Parish School Board will, not later than January 1, 1966, mail notices to all students, regardless of race or color,

presently assigned for the school year 1965-1966 to the First, Eighth, Ninth, and Twelfth grades of any school under its jurisdiction, advising them that they may, within five days thereafter, apply in person, accompanied by parents or guardian, for transfer and reassignment to another school of their choice, effective mid-term January 1966.

(b) Such transfers will be made in accordance with the procedures pertaining to transfers currently in general use by the Claiborne Parish School Board.

(c) Application forms for transfers or assignments will be made available, upon request, by the School Board to all students and parents affected, and complete, detailed instructions as to procedures will be furnished with the applications.

(d) Transfers or assignments, when requested, shall not be unreasonably denied. No denial of a request for transfer or assignment shall be based on race or color. However, in determining whether or not a request for transfer or assignment shall be granted, the School Board, in considering the application for transfer or assignment, may consider the following factors as proper criteria to be applied in granting or denying the request for transfer or assignment:

(1) The desire or wishes of the pupil and his parents or guardian.

(2) Availability of space and other facilities in the school to which the transfer or assignment is requested.

(3) The age of the pupil as compared with the ages of pupils already attending the school to which transfer is requested.

(4) The availability of requested or desired courses of study in the school to which the transfer is requested.

(5) In the event a transfer or assignment is requested to a particular school, but it develops that there is available space in another school, in all respects comparable to the one to which transfer or assignment is requested, closer to the applicant's residence, the School Board may, if it deems it advisable, make the transfer or assignment to the comparable school closest to the pupil's residence, rather than to the school to which the transfer or assignment was requested.

(6) No pupil will be granted more than one transfer in any one school year, except under special circumstances found justifiable by the School Board.

(7) No request for transfer or assignment may be denied solely on the grounds of technical errors or omissions made by the applicant or his parents or guardian in the preparation of the application for transfer or assignment.

(8) Any new students, entering the school system for the first time, regardless of grade, shall be entitled to assignment according to their choice to the former all white school or former all Negro school closest to their place of residence.

(e) All pupils requesting transfer or assignment in accordance herewith shall be notified in writing by the School Board of action taken on their requests for transfer or assignment not later than January 14, 1966, to be effective at mid-term, 1966. If such notification is to the effect that the requested transfer or assignment has been denied, specific reasons for such denial shall be clearly set forth in the notification.

2. Commencing with the school year 1966-67 all initial assignments of pupils to the First, Second, Seventh, Eighth, Ninth, Tenth, Eleventh, and Twelfth grades in all schools under the supervision and control of the Claiborne Parish School Board shall be made purely and simply on the basis of individual choice, reserving to all pupils, however, the right to apply for transfer in accordance with the procedures hereinabove established, and reserving to the School Board through its authorized representatives, the right to place a pupil in a comparable school other than the school of his choice should there be a comparable school closer to the pupil's residence than is the school of his choice.

To accomplish this, the Claiborne Parish School

Board shall, not later than May 1, 1966, mail notices to all students, regardless of race or color, who can be expected to enroll for the school year 1966-67 in the First, Second, Seventh, Eighth, Ninth, Tenth, Eleventh, and Twelfth grades of all schools under its jurisdiction, advising them that they may, within five days from the mailing date of such notices, apply in person, accompanied by parents or guardian, for transfer and reassignment to the school of their choice, subject to the rules and procedures above set forth.

3. Commencing with the school year 1967-68, all initial assignments of pupils to all grades in all schools under the supervision and control of the Claiborne Parish School Board shall be made purely and simply on the basis of individual choice, reserving to all pupils, however, the right to apply for transfer in accordance with the procedures hereinabove established, and reserving to the School Board through its authorized representatives, the right to place a pupil in a comparable school other than the school of his choice should there be a comparable school closer to the pupil's residence than is the school of his choice.

4. Dual school districts on racial lines shall be abolished contemporaneously with the application of this plan to the respective grades when and as reached by the application of this plan.

5. The method of initial assignment herein pro-

vided for will, of course, be subject to all reasonable procedural acquirements that may be adopted and promulgated by the Claiborne Parish School Board.

6. Nothing contained in this order shall be construed to prevent the separation of boys and girls in any school or grade, or to prevent the assignment of boys and girls to separate schools.

7. If any paragraph of these rules and procedures shall be held by any court of competent jurisdiction to be invalid for any reason, the remainder of such rules and procedures shall continue in full force and effect.

IT IS FURTHER ORDERED that respondents herein, and their successors in office, their agents, servants, representatives, or employees, and all other persons whomsoever acting in concert with any and all of such persons, are hereby permanently enjoined from doing anything calculated to obstruct or interfere with the orderly administration of this plan for effecting the transition of the schools hereinabove mentioned to a racially non-discriminatory basis.

Jurisdiction of this matter is retained for the entry of any further orders hereafter deemed necessary in the premises.

SIGNED this 11th day of October, 1965, at Shreveport, Louisiana.

/s/ Ben C. Dawkins, Jr.

CHIEF JUDGE

Exhibit "D"

ORDER ON PLAN FOR DESEGREGATION

(Number and title omitted) (Filed: October 5, 1965)

Respondent, Jackson Parish School Board, pursuant to this Court's Order of July 27, 1965, has presented to the Court a proposed plan for desegregation of the Jackson Parish School System. The plaintiffs have presented their objections thereto.

Now, after due consideration of the proposed plan submitted by respondent and the objections thereto presented by plaintiffs, and after taking into consideration the local problems inherent in any attempt to desegregate the public schools in Jackson Parish, as well as prior pronouncements of the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit, by which pronouncements this Court is bound:

IT IS ORDERED that the following plan for the orderly desegregation of the schools under the supervision and control of the Jackson Parish School Board be, and it is hereby, approved and adopted:

1. All initial pupil assignments made for the school year 1965-1966 will be considered adequate, subject however to the following transfer provisions:

   (a) The Jackson Parish School Board will, not later than December 1, 1965, mail notices to

all students, regardless of race or color, presently assigned for the school year 1965-1966 to the First, Second, Eleventh and Twelfth grades of any school under its jurisdiction, advising them that they may, from January 3, 1966, to January 7, 1966, apply in person, accompanied by parents or guardian, for transfer and reassignment to another school of their choice.

(b) Such transfers will be made in accordance with the procedures pertaining to transfers currently in general use by the Jackson Parish School Board.

(c). Application forms for transfers or assignments will be made available, upon request, by the School Board to all students and parents affected, and complete, detailed instructions as to procedures will be furnished with the applications.

(d) Transfers or assignments, when requested, shall not be unreasonably denied. No denial of a request for transfer or assignment shall be based on race or color. However, in determining whether or not a request for transfer or assignment shall be granted, the School Board, in considering the application for transfer or assignment, may consider the following factors as proper criteria to be applied in granting or denying the request for transfer or assignment:

(1) The desire or wishes of the pupil and his parents or guardian.

(2) Availability of space and other facilities in the school to which the transfer or assignment is requested.

(3) The age of the pupil as compared with the ages of pupils already attending the school to which transfer is requested.

(4) The availability of requested or desired courses of study in the school to which the transfer is requested.

(5) In the event a transfer or assignment is requested to a particular school, but it develops that there is available space in another school, in all respects comparable to the one to which transfer or assignment is requested, closer to the applicant's residence, the School Board may, if it deems it advisable, make the transfer or assignment to the comparable school closest to the pupil's residence, rather than to the school to which the transfer or assignment was requested.

(6) No pupil will be granted more than one transfer in any one school year, except under special circumstances found justifiable by the School Board.

(7) No request for transfer or assignment may be denied solely on the grounds of technical errors or omissions made by the the applicant or his parents or guardian in the preparation of the application for transfer or assignment.

(8) Any new students, entering the school system for the first time, regardless of grade, shall be entitled to assignment according to their choice to the former all white school or former all Negro school closest to their place of residence.

(e) All pupils requesting transfer or assignment in accordance herewith shall be notified in writing by the School Board of action taken on their requests for transfer or assignment not later than January 14, 1966, to be effective at mid-term, 1966. If such notification is to the effect that the requested transfer or assignment has been denied, specific reasons for such denial shall be clearly set forth in the notification.

2. Commencing with the school year 1966-67 all initial assignments of pupils to the First, Second, Third, Fourth, Ninth, Tenth, Eleventh, and Twelfth grades in all schools under the supervision and control of the Jackson Parish School Board shall be made purely and simply on the basis of individual choice, reserving to all pupils, however, the right to apply for transfer in accordance with the procedures hereinabove established, and reserving to the School Board through its authorized representatives, the right to place a pupil in a comparable school other than the school of his choice should there be a comparable school closer to the pupil's residence than is the school of his choice.

3. Commencing with the school year 1967-68, all initial assignments of pupils to all grades in all schools under the supervision and control of the Jackson Parish School Board shall be made purely and simply on the basis of individual choice, reserving to all pupils, however, the right to apply for transfer in accordance with the procedures hereinabove established, and reserving to the School Board through its authorized representatives, the right to place a pupil in a comparable school other than the school of his choice should there be a comparable school closer to the pupil's residence than is the school of his choice.

4. Dual school districts on racial lines shall be abolished contemporaneously with the application of this plan to the respective grades when and as reached by the application of this plan.

5. The method of initial assignment herein provided for will, of course, be subject to all reasonable procedural requirements that may be adopted and promulgated by the Jackson Parish School Board.

6. Nothing contained in this order shall be construed to prevent the separation of boys and girls in any school or grade, or to prevent the assignment of boys and girls to separate schools.

7. If any paragraph of these rules and procedures shall be held by any court of competent jurisdiction to be invalid for any reason, the re-

mainder of such rules and procedures shall continue in full force and effect.

IT IS FURTHER ORDERED that respondents herein, and their successors in office, their agents, servants, representatives, or employees and, all other persons whomsoever acting in concert with any and all of such persons, are hereby permanently enjoined from doing anything calculated to obstruct or interfere with the orderly administration of this plan for effecting the transition of the schools hereinabove mentioned to a racially non-discriminatory basis.

Jurisdiction of this matter is retained for the entry of any further orders hereafter deemed necessary in the premises.

/s/ Ben C. Dawkins, Jr.

CHIEF JUDGE

Exhibit "E"

ORDER ON PLAN FOR DESEGREGATION

(Number and title omitted) (Filed: November 2, 1965)

Respondent, Monroe City School Board, pursuant to this Court's Order of September 17th, 1965, has presented to the Court a proposed plan for desegregation of the Monroe City School system. The plaintiffs have presented their objections thereto.

Now, after due consideration of the proposed plan submitted by respondent and the objections thereto presented by plaintiffs, and after taking into consideration the local problems inherent in any attempt to desegregate the public schools in the City of Monroe, as well as prior pronouncements of the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit, by which pronouncements this Court is bound:

IT IS ORDERED that the following plan for the orderly desegregation of the schools under the supervision and control of the Monroe City School Board be, and it is hereby, approved and adopted:

1. All initial pupil assignments made for the school year 1965-1966 will be considered adequate, subject however to the following transfer provisions:

   (a) The Monroe City School Board will, not later than January 1, 1966, mail notices to all students, regardless of race or color, pres-

ently assigned for the school year 1965-1966 to the First, Second, Eleventh and Twelfth grades of any school under its jurisdiction, advising them that they may, within five days thereafter, apply in person, accompanied by parents or guardian for transfer and reassignment to another school of their choice, effective mid-term January 1966.

(b) Such transfers will be made in accordance with the procedures pertaining to transfers currently in general use by the Monroe City School Board.

(c) Application forms for transfers or assignments will be made available, upon request, by the School Board to all students and parents affected, and complete, detailed instructions as to procedures will be furnished with the applications.

(d) Transfers or assignments, when requested, shall not be unreasonably denied. No denial of a request for transfer or assignment shall be based on race or color. However, in determining whether or not a request for transfer or assignment shall be granted, the School Board, in considering the application for transfer or assignment, may consider the following factors as proper criteria to be applied in granting or denying the request for transfer or assignment:

(1) The desire or wishes of the pupil and his parents or guardian.

(2) Availability of space and other facilities in the school to which the transfer or assignment is requested.

(3) The age of the pupil as compared with the ages of pupils already attending the school to which transfer is requested.

(4) The availability of requested or desired courses of study in the school to which the transfer is requested.

(5) In the event a transfer or assignment is requested to a particular school, but it develops that there is available space in another school, in all respects comparable to the one to which transfer or assignment is requested, closer to the applicant's residence, the School Board may, if it deems it advisable, make the transfer or assignment to the comparable school closest to the pupil's residence, rather than to the school to which the transfer or assignment was requested.

(6) No pupil will be granted more than one transfer in any one school year, except under special circumstances found justifiable by the School Board.

(7) No request for transfer or assignment may be denied solely on the grounds of technical errors or omissions made by the applicant or his parents or guardian in the prep-

aration of the application for transfer or assignment.

(8) Any new students, entering the school system for the first time, regardless of grade, shall be entitled to assignment according to their choice to the former all white school or former all Negro school closest to their place of residence.

(e) All pupils requesting transfer or assignment in accordance herewith shall be notified in writing by the School Board of action taken on their requests for transfer or assignment not later than January 14, 1966, to be effective at mid-term, 1966. If such notification is to the effect that the requested transfer or assignment has been denied, specific reasons for such denial shall be clearly set forth in the notification.

2. Commencing with the school year 1966-1967 all initial assignments of pupils to the First, Second, Third, Fourth, Ninth, Tenth, Eleventh, and Twelfth grades in all schools under the supervision and control of the Monroe City School Board shall be made purely and simply on the basis of individual choice, reserving to all pupils, however, the right to apply for transfer in accordance with the procedures hereinabove established, and reserving to the School Board through its authorized representatives the right to place a pupil in a comparable school other than the school of his choice should there be a comparable

school closer to the pupil's residence than is the school of his choice.

To accomplish this, the Monroe City School shall, not later than May 1, 1966, mail notices to all students, regardless of race or color, who can be expected to enroll for the school year 1966-1967 in the First, Second, Third, Fourth, Ninth, Tenth, Eleventh, and Twelfth grades of all schools under its jurisdiction, advising them that they may, within five days from the mailing date of such notices, apply in person, accompanied by parents or guardian, for transfer and reassignment to the school of their choice, subject to the rules and procedures above set forth.

3. Commencing with the school year 1967-1968, all initial assignments of pupils to all grades in all schools under the supervision and control of the Monroe City School Board shall be made purely and simply on the basis of individual choice, reserving to all pupils, however, the right to apply for transfer in accordance with the procedures hereinabove established, and reserving to the School Board through its authorized representatives, the right to place a pupil in a comparable school other than the school of his choice should there be a comparable school closer to the pupil's residence than is the school of his choice.

4. Dual school districts on racial lines shall be abolished contemporaneously with the application

of this plan to the respective grades when and as reached by the application of this plan.

5. The method of initial assignment herein provided for will, of course, be subject to all reasonable procedural requirements that may be adopted and promulgated by the Monroe City School Board.

6. Nothing contained in this order shall be construed to prevent the separation of boys and girls in any school or grade, or to prevent the assignment of boys and girls to separate schools.

7. If any paragraph of these rules and procedures shall be held by any court of competent jurisdiction to be invalid for any reason, the remainder of such rules and procedures shall continue in full force and effect.

IT IS FURTHER ORDERED that respondents herein, and their successors in office, their agents, servants, representatives, or employees, and all other persons whomsoever acting in concert with any and all of such persons, are hereby permanently enjoined from doing anything calculated to obstruct or interfere with the orderly administration of this plan for effecting the transition of the schools hereinabove mentioned to a racially non-discriminatory basis.

Jurisdiction of this matter is retained for the entry of any further orders hereafter deemed necessary in the premises.

SIGNED this 2nd day of November, 1965, at Shreveport, Louisiana.

/s/ Ben C. Dawkins, Jr.

CHIEF JUDGE

Exhibit "F"

Selected Portions of Statements by Floor Leader, Senator Hubert Humphrey.

110 Congressional Record, Vol. 5, page 6546.

Title VI is also not an interference in any sense with private business and individual rights. It does not confer any new Federal authority; it merely states how the authority conferred by other laws is to be administered. It is not a regulatory measure, but an exercise of the unquestioned power of the Federal Government to "fix the terms on which Federal funds shall be disbursed." *Okalhoma v. Civil Service Commission*, 330 U.S. 127, 143 (1947). No recipient is required to accept Federal aid. If he does so voluntarily, he must take it on the conditions on which it is offered.

110 Congressional Record, Vol. 5, page 6545.

This does not mean that title VI would authorize a Federal official to prescribe pupil assignments, or to select a faculty, as opponents of the bill have suggested. The only authority conferred would be authority to adopt, with the approval of the President, a general requirement that the local school authority refrain from racial discrimination in treatment of pupils and teachers, and authority to achieve compliance with that requirement by cutoff of funds or by other means authorized by law.

110 Congressional Record, Vol. 10, pages 12713 thru 12717.

TITLE IV

Title IV, dealing with public school desegregation, is amended and clarified in several respects in our substitute.

One amendment would provide that before the Attorney General can institute suit he must believe that the complaint, filed with him by an individual concerning a denial of equal protection, is meritorious. A further change would provide that any such complaint must be in writing.

Another amendment provides that prior to instituting suit, the Attorney General must give notice to the appropriate school authorities, and must certify that he is satisfied that these authorities have had a reasonable time in which to adjust the conditions alleged in such complaint. This is intended to recognize and preserve the importance of voluntary action by local authorities.

Next, changes are made to resolve doubts that have been expressed about the impact of the bill on the problem of correcting alleged racial imbalance in public schools. The version enacted by the House was not intended to permit the Attorney General to bring suits to correct such a situation, and, indeed, said as much in section 401(b). However, to make this doubly clear, two amendments dealing with this matter are proposed.

The first provides that nothing in title IV "shall empower any court" or official of the United States to issue "any order" seeking to achieve "a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school

district to another in order to achieve such racial balance or otherwise enlarge the existing power of the court to insure compliance with constitutional standards." This addition seeks simply to preclude an inference that the title confers new authority to deal with "racial imbalance" in schools, and should serve to soothe fears that title IV might be head to empower the Federal Government to order the busing of children around a city in order to achieve a certain racial balance or mix in schools.

Furthermore, a new section 410 would explicitly declare that "nothing in this title shall prohibit classification and assignment for reasons other than race, color, religion, or national origin."

Thus, classification along bona fide neighborhood school lines, or for any other legitimate reason which local school boards might see fit to adopt, would not be affected by title IV, so long as such classification was bona fide. Furthermore, this amendment makes clear that the only Federal intervention in local schools will be for the purpose of preventing denial of equal protection of the laws.

Another amendment, by some appropriate changes in the wording of section 401(c) which defines "public school," corrects a technical deficiency of language, and makes clear that the power to sue, as granted the Attorney General by title IV, is limited to bringing suits to desegregate public or publicly supported schools, not private schools. Of course, it was never intended to reach private schools, which are not prohibited by the

14th amendment from discrimination. The amendment would make this explicit.

Other minor changes include deleting the concept of the "public policy of the United States favoring" the orderly achievement of school desegregation, for the same reason the phrase would be deleted in title III; and a revision, identical to that made in title III, of the guidelines for the Attorney General concerning when in his judgment he may deem persons unable to initiate and maintain appropriate legal proceedings for relief. And, as in title III, the criminal sanctions of the false writing and document statute, 18 U.S.C. 1001, are made applicable to complaints filed with the Attorney General.

TITLE V

The major change in title V sets out in greater detail the procedures the Civil Rights Commission must follow, particularly with respect to its hearings. While the Commission already follows many of these procedures, the purpose of these amendments is to write these procedural safeguards into the Commission's basic charter. These specific procedural requirements are designed to afford additional protection to witnesses appearing before the Commission. While the bill would retain the present provision that a witness before the Commission may be accompanied and advised by counsel, it would extend the protection by providing that counsel may examine his client, object on the record, and argue briefly in support of the objection.

The amended version would also extend the protection afforded persons who may be defamed or incriminated by

testimony given at a Commission hearing. As in the House version of the bill, if the Commission thinks any testimony may tend to defame or incriminate, it is required to receive the testimony in executive session. The amendment would further provide that before the Commission may decide to use such evidence it must afford the person affected by the testimony the opportunity to appear and be heard in executive session, with a reasonable number of additional witnesses. Furthermore, if the Commission decides to release the defaming testimony, this material must first be presented at a public session and the defamed individual shall be allowed to appear at this session and to file statements in his behalf.

The Commission will also be required first, to publish in the Federal Register notice of any hearings it intends to hold, including the time, place, and subject matter of the hearing; second, to give a copy of its rules to prospective witnesses; and third, to make transcripts of all its hearings. Witnesses will be entitled to purchase or inspect transcripts of testimony and the general public also may purchase transcripts of public sessions of the Commission. The Commission will also have to publish in the Federal Register its organizational structure, its methods of operation, and its rules.

The Commission will be restricted to the rules, organizations, and procedure as published. And, by amendments to section 506, it will be required that first, hearings may be held only by the Commission or by a subcommittee thereof composed of members of both political parties; second, subpenas may be issued only in accordance with the rules specified in the act; third, the holding of hearings must be approved by a majority of the members

present at a meeting at which at least a quorum of four members are present; and fourth, that the courts may require the production before the Commission only of evidence which is "pertinent, relevant, and nonprivileged."

The other principal change in title V amends section 504, which lists the Commission's duties. This amendment makes it clear that the functions of the Commission are not to be expanded beyond matters constituting "denials of" the equal protection of the laws "because of race, color, religion, or national origin or in the administration of justice." This change does not alter to any significant extent the function of the Commission since it has in the past largely confined itself to this phase of denials of equal protection. The change is designed merely to conform the statutory powers of the Commission to the areas in which it has in the past operated and in which it contemplates operations. Basically, as the amendment indicated, these are denials of equal protection because of race, color, religion, or national origin, and denials of equal protection in the administration of justice, whether or not related to race, color, religion, or national origin.

I believe the revisions of title V have been very helpful, and I hope that Senators will study those revisions most carefully.

TITLE VI

We have made no changes of substance in title VI, which is concerned with discrimination in programs that receive financial assistance from the Federal Government. We have made several minor adjustments and, in addition,

we have modified the language to make explicit the declared intention of this title.

Section 601 would be amended by striking the introductory phrase, "Notwithstanding any inconsistent provision of any other law." No substantive alteration is intended by this deletion and there is no intention to revitalize or otherwise preserve the provisions of any other statute which would authorize discrimination in Federal programs or preclude action in accordance with the provisions of this title to prevent such discrimination. And, of course, in accordance with the many prior explanations given here and on the floor of the House, title VI would still have no effect on already existing executive authority in areas beyond the scope of the title.

Some Senators have expressed the fear that in its original form title VI would authorize cutting off of all Federal funds going to a State for a particular program even though only one part of the State were guilty of racial discrimination in that program. And some Senators have feared that the title would authorize canceling all Federal assistance to a State if it were discriminating in any of the federally assisted programs in that State.

As was explained a number of times on the floor of the Senate, these interpretations of title VI are inaccurate. The title is designed to limit any termination of Federal assistance to the particular offenders in the particular area where the unlawful discrimination occurs. Since this was our intention, we have made this specific in the provisions of title VI by adding language to 602 to spell out these limitations more precisely. This language provides that any termination of Federal assistance will be

restricted to the particular political subdivision which is violating nondiscrimination regulatons established under title VI. It further provides that the termination shall affect only the particular program, or part thereof, in which such a violation is taking place.

It is understood, of course, that a Federal agency would take such action as was necessary to effectuate a limited cutoff if a State agency attempted to continue payments to an offending local agency.

I might add that the discussions on the floor of the Senate, particularly by the Senator from Vermont [Mr. Aiken], the Senator from Tennessee [Mr. Gore], the Senator from Rhode Island [Mr. Pastore], the Senator from Connecticut [Mr. Ribicoff], and the Senator from West Virginia [Mr. Byrd], were taken into consideration in the revision or preparation of the amendments to title VI.

Mr. BYRD of West Virginia. Mr. President, will the Senator yield?

Mr. HUMPHREY. I yield to the Senator from West Virginia.

Mr. BYRD of West Virginia. Can the Senator from Minnesota assure the Senator from West Virginia that under title VI school children may not be bused from one end of the community to another end of the community at the taxpayers' expense to relieve so-called racial imbalance in the schools?

Mr. HUMPHREY. I do.

Mr. BYRD of West Virginia. Will the Senator from Minnesota cite the language in title VI which would give the Senator from West Virginia such assurance?

Mr. HUMPHREY. That language is to be found in another title of the bill, in addition to the assurances to be gained from a careful reading of title VI itself.

Mr. BYRD of West Virginia. In title IV?

Mr. HUMPHREY. In title IV of the bill.

Mr. BYRD of West Virginia. Will the Senator from Minnesota read that language in title IV?

Mr. HUMPHREY. Yes; I would be more than happy to do so.

The provision merely quotes the substance of a recent court decision, which I have with me, and which I desire to include in the Record today, the so-called Gary case. The language appears on page 21 of the substitute bill beginning on line 18. It refers back to matters of desegregation. The language is as follows:

Provided, That nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.

Mr. BYRD of West Virginia. What does the word "herein" mean?

Mr. HUMPHREY. It means within the act.

Mr. BYRD of West Virginia. Does it mean the act or the title?

Mr. HUMPHREY. It means the act. If the Senator would like to offer an amendment, if he believes we have not been sufficiently precise, I wish he would do so. As Senator in charge of the bill, I would entertain such an amendment.

Mr. BYRD of West Virginia. But would the Senator from Minnesota also indicate whether the words "provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance" would preclude the Office of Education, under section 602 or title VI, from establishing a requirement that school boards and school districts shall take action to relieve racial imbalance wherever it may be deemed to exist?

Mr. HUMPHREY. Yes. I do not believe in duplicity. I believe that if we include the language in title IV, it must apply throughout the act. However, the courts would hold that if there were gerrymandering of school districts to provide for segregation, the order of the court to declare such gerrymandering unconstitutional would prevail. That is what we call the de facto school segregation problem.

Mr. BYRD of West Virginia, Yes.

Mr. HUMPHREY, As the law in the Federal court now stands, while intentional gerrymandering of school districts to perpetuate segregation has been held to be a violation of the 14th amendment, normal residential zoning resulting in de facto school desegregation will apparently be upheld by the courts. As to racial balancing, Judge Beamer's opinion in the Gary case is significant in this connection. In discussing this case, as we did many times, it was decided to write the thrust of the court's opinion into the proposed substitute. There was quite an argument about it among those of us who tried to prepare the substitute, but the Senators may recall that the Supreme Court refused to grant certiorari in this case. In effect, the ruling of the circuit court has been upheld.

Mr. BYRD of West Virginia. That may be true, but I must give my most careful attention to the proposal which may be enacted by the Congress. I merely wish to make doubly sure that the language is not unclear on the point, and I do not state at this time that I am opposed to the busing of children or that I support the busing of children. There is a great question in the minds of many Senators—and there is a question in my own mind—as to whether the subject, as treated herein, is completely unambiguous.

I agree that the language in title IV should make the point clear, insofar as title IV is concerned. I agree that no court, on the basis of this provision, would be empowered to issue any order seeking to achieve a racial balance in any school. But it does not mean that any agency in the Government could not cut off Federal

assistance. The issuance of a court order and the termination of Federal assistance are two different matters. Title VI in section 601 provides:

Sec. 601. No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 602 is for the purpose of implementing the policy laid down in section 601.

Mr. HUMPHREY. Correct.

Mr. BYRD of West Virginia. But in order to implement that policy it is provided in H.R. 7152 that each Federal department and agency, and this includes the Office of Education, which is empowered to extend Federal financial assistance to any program or activity by way of grant, loan, or contract other than a contract of insurance or guarantee, shall take action.

I believe that in the substitute bill the language "is authorized and directed," is used, which means "shall take action," with respect to such program or activity, to effectuate the policy that is enunciated in section 601.

It provides further:

Such action may be taken or pursuant to rule, regulation, or order—

These words may have been changed in the substitute, which I do not have before me—

It provides further:

After a hearing, compliance with any requirement—

I repeat "any requirement." "Any requirement" means "any requirement"—

Suppose the Office of Education establishes a regulation that there shall be no racial imbalance in the schools of any district which receives Federal assistance. Cannot the Office of Education, pursuant to carrying out this regulation, deny assistance to school district wherein racial imbalance exists?

Mr. HUMPHREY. Let me read from the substitute:

Provided, That nothing herein shall empower any official or court of the United States to issue any order.

Mr. BYRD of West Virginia. "To issue any order," but does it provide that the Office of Education shall not cut off Federal assistance?

Mr. HUMPHREY. But in order to cut off Federal assistance, the President would have to issue the order, if the Senator will read section 602.

Mr. BYRD of West Virginia. The words are:

No such rule, regulation, or order shall become effective unless and until approved by the President.

Mr. HUMPHREY. That is correct.

Mr. BYRD of West Virginia. What assurance does the Senator give me that the President will not approve such a requirement?

Mr. HUMPHREY. Because I do not believe the President will violate the law.

Mr. BYRD of West Virginia, The Senator says "I do not believe."

Mr. HUMPHREY. I cannot go to the White House and take a blood oath from him, but the President can read—

Mr. BYRD of West Virginia. The President would not be violating the law if such a requirement were established with his approval.

Mr. HUMPHREY. It is already provided in the proposed substitute that—

Nothing herein shall empower any official or court of the United States to issue any order,

Mr. BYRD of West Virginia. That is correct, but that is in title IV.

Mr. HUMPHREY. But it applies to the act.

Mr. BYRD of West Virginia. It may so apply.

Mr. HUMPHREY. If the Senator wishes to offer an amendment to clarify it, he may do so. I said I would be more than happy, as manager of the bill, to accept such an amendment. He has made his point. He should not convince me to the contrary.

Mr. BYRD of West Virginia. I am not convinced that the words "any requirement" cannot be utilized by the Office of Education, if it so desires, to achieve an objec-

tive of racial balance in the schools. That provision does not require that a court issue an order. It merely provides that, at the stroke of a pen, some bureaucrat in the Office of Education may cut off Federal assistance to a particular school district which does not act to comply with "any requirement" to correct racial imbalance.

Mr. HUMPHREY. I want to set the troubled mind of the distinguished Senator at rest. What we have done is to take into consideration the concern of the distinguished and able Senator from West Virginia. We remember his discussion on the floor. Under title IV and under title VI I have already indicated to the Senator that the word "herein" applies to the act—

Mr. BYRD of West Virginia. The Senator from Minnesota has said that.

Mr. HUMPHREY. But I am manager of the bill, and, as a part of the legislative history, that would have some importance. It would not be important because those words came from Senator Humphrey, but it would be important because the Senator from Minnesota is manager of the bill. I shall be glad to accept an amendment to clarify that point to make it more precise. One cannot get anything more definite than that.

Mr. BYRD of West Virginia. The Senator refers to legislative history.

Mr. HUMPHREY: Yes.

Mr. BYRD of West Virginia. He did that in the conference.

Mr. HUMPHREY: We will not worry about legislative history. We will accept the amendment. Where the language reads "herein," we will amend it to mean "herein in this act."

Mr. BYRD of West Virginia. I do not think that is sufficient. I think the Senator will agree with me that if we wanted to make it entirely unambiguous, we would have to write language more specifically to the point into title VI.

Mr. HUMPHREY. If the Senator will read all of title VI—

Mr. BYRD of West Virginia. I have, not once, but many times.

Mr. HUMPHREY. The worry is that some bureaucrat may issue an order that would cut off funds to a department or instrumentality or agency of a State or local government or school or some such activity or institution. What did we do to make sure that would not happen? We provided the language:

No such rule, regulation, or order shall become effective unless and until approved by the President.

Then comes this language:

Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity

for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate—

Like the Appropriations Committee of which the distinguished Senator from West Virginia is a member—having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Mr. BYRD of West Virginia. The Appropriations Committee does not have legislative jurisdiction.

Mr, HUMPHREY. It reads "having legislative jurisdiction over the program or activity involved."

The Appropriations Committee has the power of the purse.

Mr. BYRD of West Virginia. That is not legislative jurisdiction. The language reads: "legislative jurisdiction."

Mr. HUMPHREY. That is correct. I say most respectfully that the Appropriations Committee has a way of being able to get into practically every committee activity, because it has the power of the purpose.

I cannot believe the Senator's worries are well grounded. We are willing to listen to the Senator's arguments or his amendment, for I think he would probably secure great support.

Mr. BYRD of West Virginia. Mr. President, it is not my purpose to harass the Senator from Minnesota, or to attempt to do so. I simply feel that the language in title VI which reads "any requirement" is not clear and that this language would permit the Office of Education, if it desired to do so, to establish a requirement to correct racial imbalance, whatever that is, and I am not sure anyone knows. Of course, the President could approve that requirement without violating the law; and even though President Johnson might not do so, perhaps some subsequent President would approve such a requirement. If that happened, it seems to me the Office of Education could terminate or refuse to grant assistance to any school district in the country if it did not comply with such requirement. Now, the very able and friendly Senator from Minnesota has referred to the making of legislative history on this point. As to legislative history, I should like to read from People against New York Central R.R. Co., Court of Appeals of New York, 1855—these words:

If its language—

Referring to a statute—

is plain and unambiguous, there is no room for construction.

It seems to me that the language "any requirement" is plain and unambiguous.

(At this point Mr. Metcalf took the chair as Acting President pro tempore.)

Mr. HUMPHREY. Unless one has a proviso. We are always adding a proviso to something. We can say, "The President of the United States shall do this, provided that he shall not do that." What we have done here is to provide that, "You shall do certain things, provided that," and then we list what cannot be done.

Mr. BYRD of West Virginia. Where is the proviso in title VI which would prohibit the Office of Education from doing what I have just stated it might conceivably do?

Mr. HUMPHREY. There is such a thing as having a statement written into an act that covers the act. One does not have to repeat it in every other paragraph.

Mr. BYRD of West Virginia. Mr. President, there is—

Mr. JAVITS. Mr. President, will the Senator allow me to interject at that point?

Mr. HUMPHREY. I yield.

Mr. JAVITS. I believe I know what the Senator from West Virginia [Mr. Byrd] is asking about. I had a great deal to do with drafting the point we are talking about.

I should like to point out that the operative words of section 602 in title VI are these: "which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance."

I invite the attention of the Senator from West Virginia to page 33, lines 9, 10, and 11 of the amendment in the nature of a substitute.

In short, the only time there can be a cutoff of funds is if the segregation or discrimination is being practiced in respect to a matter which if stopped will still not throw us out in this definition as to the "achievement of the objectives of the statute authorizing the financial assistance."

Taking the case of the schools to which the Senator is referring, and the danger of envisaging the rule or regulation relating to racial imbalance, it is negated expressly in the bill, which would compel racial balance. Therefore, there is no case in which the thrust of the statute under which the money would be given would be directed toward restoring or bringing about a racial balance in the schools. If such a rule were adopted or promulgated by a bureaucrat, and approved by the President, the Senator's State would have an open and shut case under section 603. That is why we have provided for judicial review. The Senator knows as a lawyer that we never can stop anyone from suing, nor stop

any Government official from making a fool of himself, or from trying to do something that he has no right to do, except by remedies provided by law. So I believe it is that set of words which is operative.

Let me give the Senator an example, because we discussed the question in great detail. We discussed in great detail the situation in which a contractor on Government work — that is, work in which the United States puts up some of the money. Assume he is a road contractor and was discriminating in his business against hiring Negroes, but he was not discriminating on that particular job.

I state for the RECORD that because he was discriminating generally, but was not discriminating on that job, we could not cut off his funds because the statute which permitted the Federal Government to put up its share of the money did not apply to the contractor's general business operations. It applied only to the construction of the road.

Mr. BYRD of West Virginia. Only where the funds were being applied.

Mr. JAVITS. The Senator is correct. If his nose was clean, to use a curbstone phrase, in terms of employment practices on the road job, that is as far as we could go.

(At this point, Mr. BURDICK took the chair as Presiding Officer.)

Mr. BYRD of West Virginia. I thank the Senator from New York for his interpretation of the language.

I trust that it will help to clarify the intent of the title. I also thank the Senator from Minnesota for yielding additionally.

In closing, if the Senator from Minnesota will permit me, I should like to read into the RECORD one excerpt from the case of *Woollcott v. Shubert* (111 N.E. 829):

It is established law, however, that the statements and opinions of legislators uttered in the debates are not competent aids to the court in ascertaining the meaning of statutes.

If we are going to talk about legislative history, I believe that we had better not lean too much upon the assurance of the distinguished Senator from Minnesota, which he gave to me in one of the conferences, and which he has reiterated on the floor of the Senate today, that we will, through this debate, establish legislative history to make clear the intent of the statute. I believe that the words of title VI — "any requirement adopted pursuant to this section" — are presently clear in themselves, and words uttered by us, the legislators, in this debate may not constitute competent aids to the courts in establishing a true legislative intent.

Mr. HUMPHREY. I recognize that the Senator has quoted the citation. I can give him quotations contrary to that one, without fear of contradiction. I am not a lawyer, but I have studied jurisprudence, constitutional law, and case law, and I know of no time when a court of competent jurisdiction has said that statements made by legislators relating to a law are without meaning or

that they have no effect upon the interpretation of law or the application of law. To the contrary.

Mr. BYRD of West Virginia. The Senator says he knows of no cases in which the courts have so held. However, I have just cited one case. I can cite the Senator another. *Duplex Printing Press Co. v. Deering* (254 U.S. 443):

By repeated decisions of this court, it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the lawmaking body.

It was for this reason that I joined with others in attempting to send the bill to committee, in the first instance, so that the courts would have a reliable committee report upon which to gage and judge and ascertain the intent of the legislative body.

Mr. HUMPHREY. I say most respectfully to the Senator that in the circumstances in which we find ourselves, if the Senator in charge of the bill, or the Senator who submits an amendment to a bill makes a statement relating to the bill, while it is not conclusive, it is considered to be relevant and considered to be interpretive of the statute.

But there is an easy way to answer the Senator's question: Let the Senator put what he wants into an amendment. I do not see any reason for him to be on the fringes of this issue. All he has to do is to offer an amendment, if he has any doubts.

The Senator has been discussing the amendment with me. There is no problem. I should be happy to join him in encouraging Senators to approve of his amendment.

I should like to make one further reference to the Gary case. This case makes it quite clear that while the Constitution prohibits segregation, it does not require integration. The busing of children to achieve racial balance would be an act to effect the integration of schools. In fact, if the bill were to compel it, it would be a violation, because it would be handling the matter on the basis of race and we would be transporting children because of race. The bill does not attempt to integrate the schools, but it does attempt to eliminate segregation in the school systems. The natural factors such as density of population, and the distance that students would have to travel are considered legitimate means to determine the validity of a school district, if the school districts are not gerrymandered, and in effect deliberately segregated. The fact that there is a racial imbalance per se is not something which is unconstitutional. That is why we have attempted to clarify it with the language of section 4.

Exhibit "G"

CIVIL RIGHTS ACT OF 1964

TITLE IV—

DESEGREGATION OF PUBLIC EDUCATION

DEFINITIONS

Sec. 401. As used in this title —

(a) "Commissioner" means the Commissioner of Education.

(b) "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

(c) "Public school" means any elementary or secondary educational institution, and "public college" means any institution of higher education or any technical or vocational school above the secondary school level, provided that such public school or public college is operated by a State, subdivision of a State, or governmental agency within a State, or operated wholly or predominantly from or through the use of governmental funds or property, or funds or property derived from a governmental source.

(d) "School board" means any agency or agencies which administer a system of one or more public schools and any other agency which is responsible for the assignment of students to or within such system.

SURVEY AND REPORT OF EDUCATIONAL OPPORTUNITIES

Sec. 402. The Commissioner shall conduct a survey and make a report to the President and the Congress, within two years of the enactment of this title, concerning the lack of availability of equal educational opportunities for individuals by reason of race, color religion, or national origin in public educational institutions at all levels in the United States, its territories and possessions, and the District of Columbia.

TECHNICAL ASSISTANCE

Sec. 403. The Commissioner is authorized, upon the application of any school board, State, municipality, school district, or other governmental unit legally responsible for operating a public school or schools, to render technical assistance to such applicant in the preparation, adoption, and implementation of plans for the desegregation of public schools. Such technical assistance may, among other activities, include making available to such agencies information regarding effective methods of coping with special educational problems occasioned by desegregation, and making available to such agencies personnel of the Office of Education or other persons specially equipped to advise and assist them in coping with such problems.

TRAINING INSTITUTES

Sec. 404. The Commissioner is authorized to arrange, through grants or contracts, with institutions of higher education for the operation of short-term or regular session institutes for special training designed to im-

prove the ability of teachers, supervisors, counselors, and other elementary or secondary school personnel to deal effectively with special educational problems occasioned by desegregation. Individuals who attend such an institute on a full-time basis may be paid stipends for the period of their attendance at such institute in amounts specified by the Commissioner in regulations, including allowances for travel to attend such institute.

GRANTS

Sec. 405. (a) The Commissioner is authorized, upon application of a school board, to make grants to such board to pay, in whole or in part, the cost of —

(1) giving to teachers and other school personnel inservice training in dealing with problems incident to desegregation, and

(2) employing specialists to advise in problems incident to desegregation.

(b) In determining whether to make a grant, and in fixing the amount thereof and the terms and conditions on which it will be made, the Commissioner shall take into consideration the amount available for grants under this section and the other applications which are pending before him; the financial condition of the applicant and the other resources available to it; the nature, extent, and gravity of its problems incident to desegregation; and such other factors as he finds relevant.

PAYMENTS

Sec. 406. Payments pursuant to a grant or contract

under this title may be made (after necessary adjustments on account of previously made overpayments or underpayments) in advance or by way of reimbursement, and in such installments, as the Commissioner may determine.

Sec. 407. (a) Whenever the Attorney General receives a complaint in writing —

(1) signed by a parent group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, or

(2) signed by an individual, or his parent, to the effect that he has been denied admission to or not permitted to continue in attendance at a public college by reason of race, color, religion, or national origin.

and the Attorney General believes the complaint is meritorious and certifies that the signer of such complaints are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board or college authority and after certifying that he is satisfied that such board or authority has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the

United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

(b) The Attorney General may deem a person or persons unable to initiate and maintain appropriate legal proceedings within the meaning of subsection (a) of this section when such person or persons are unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation; or whenever he is satisfied that the institution of such litigation would jeopardize the personal safety, employment, or economic standing of such person or persons, their families, or their property,

(c) The term "parent" as used in this section includes any person standing in loco parentis. A "complaint" as used in this section is a writing or document within the meaning of section 1001, title 18, United States Code.

Sec. 408. In any action or proceeding under this

title the United States shall be liable for costs the same as a private person.

Sec. 409. Nothing in this title shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in public education.

Sec. 410. Nothing in this title shall prohibit classification and assignment for reasons other than race, color, religion, or national origin.

TITLE VI—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS

Sec. 601. No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Sec. 602. Each Federal department and agency which is empowered to extend federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall be come effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or

refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Sec. 603. Any department or agency action taken pursuant to section 602 shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to

section 602, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with section 10 of the Administrative Procedure Act, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that section.

Sec. 604. Nothing contained in this title shall be construed to authorize action under this title by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

Sec. 605. Nothing in this title shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

TITLE VII—EQUAL EMPLOYMENT OPPORTUNTY

DEFINITIONS

Sec. 701. For the purposes of this title —

(a) The term "person" includes one or more individuals, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty-five

or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or a State or political subdivision thereof, (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954: *Provided*, That during the first year after the effective date prescribed in subsection (a) of section 716, persons having fewer than one hundred employees (and their agents) shall not be considered employers, and, during the second year after such date, persons having fewer than seventy-five employees (and their agents) shall not be considered employers, and, during the third year after such date, persons having fewer than fifty employees (and their agents) shall not be considered employers: *Provided further*, That it shall be the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of race, color, religion, sex or national origin and the President shall utilize his existing authority to effectuate this policy.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportuniteis to work for an employer and includes an agent of such a person; but shall not include an agency of the United States, or an agency of a State or political subdivision of a State, except that such term shall include the United States Employment Service and the system of State and local employment

services receiving Federal assistance.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) one hundred or more during the first year after the effective date prescribed in subsection (a) of section 716, (B) seventy-five or more during the second year after such date or fifty or more during the third year, or (C) twenty-five or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Rela-

tions Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia,

or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

EXEMPTION

Sec. 702. This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, or society with respect to the employment or individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

Sec. 703. (a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization —

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employ-

ment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment

practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this title, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organizaton to fail or refuse to refer any individual for employment in any position, if —

(1) the occupancy of such position, or access to

the premises in or upon which any part of the duties of such position performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions

of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

(i) Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferentail treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this title, shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

OTHER UNLAWFUL EMPLOYMENT PRACTICES

Sec. 704. (a) It shall be an unlawful employment practice for an employer to discriminate against any of

his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

(b) It shall be an unlawful employment practice for an employer, labor organization, or employment agency to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

* * *

EXHIBIT "H"

Excerpts from the 1965 and 1966 Education Acts

EDUCATION ACT OF 1965
PUBLIC LAW 89-110

Sec. 604. Nothing contained in this Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution or school system, or over the selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or school system.

FEDERAL CONTROL OF EDUCATION PROHIBITED
EDUCATION ACT OF 1966
PUBLIC LAW 89-750

PART H—RACIAL IMBALANCE AND COMPLIANCE
CIVIL RIGHTS ACT OF 1964

Sec. 181. Section 704 of the Elementary and Secondary Education Act of 1965 (as redesignated by this act, and containing a prohibition against Federal control of education)[1] is amended by inserting the following at the end thereof and before the period: ", or to require the assignment or transportation of students or teachers in order to overcome racial imbalance".

FEDERAL CONTROL PROHIBITED

Sec. 312. (a) Nothing contained in this title shall be

construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution or school system, or over the selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or school system.

(b) The National Advisory Committee on Adult Basic Education is authorized to encourage the establishment of State and local adult education advisory committees in order to improve reporting of State

EXHIBIT "I"

REVISED STATEMENT OF POLICIES FOR SCHOOL DESEGREGATION PLANS UNDER TITLE IV OF THE CIVIL RIGHTS ACT OF 1964

March 1966

U. S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of Education

REVISED STATEMENT OF POLICIES FOR SCHOOL DESEGREGATION PLANS UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

(Superseding the General Statement of Policies Issued in April 1965 — 45 CFR, Part 181)

Subpart A—*Applicability of This Statement of Policies*

§ 181.1 Title VI and the HEW Regulation

Section 601 of Title VI of the Civil Rights Act of 1964 provides that:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

As required by Section 602 of Title VI, the Depart-

ment of Health, Education, and Welfare has issued a Regulation to assure the elimination of discrimination in Federal aid programs it administers. The HEW Regulation was published as Part 80 of Title 45, Code of Federal Regulations (45 CFR Part 80).

§ 181.2 Compliance by School Systems Eliminating Dual School Structure

To be eligible for Federal aid, a school system must act to eliminate any practices in violation of Title VI, including the continued maintenance of a dual structure of separate schools for students of different races. The HEW Regulation recognizes two methods of meeting this requirement: (1) a desegregation order of a Federal court; or (2) a voluntary desegregation plan.

§ 181.3 Purpose of This Statement of Policies

This Statement of Policies applies to public elementary and secondary school systems undergoing desegregation to eliminate a dual school structure. It sets forth the requirements which voluntary desegregation plans must meet for the Commissioner to determine under the HEW Regulation that a plan is adequate to accomplish the purposes of Title VI. This Statement supersedes the "General Statement of Policies Under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools," issued in April 1965 and published as 45 CFR Part 181.

§ 181.4 Initial Demonstration of Compliance

To be eligible for Federal aid, a school system must

first assure the Commissioner that it will comply with Title VI and the HEW Regulation. It must submit the form of assurance that meets its circumstances, under §§ 181.5, 181.6, or 181.7 below.

§ 181.5 Systems Without Dual School Structure

(a) *Submission of Form 441.* A school system which does not maintain any characteristic of a dual school structure may initially demonstrate compliance by submitting HEW Form 441. This is an assurance of full and immediate compliance with Title VI.

(b) *Resubmission Not Required.* A school system which has appropriately submitted HEW Form 441 need not submit a new copy with subsequent requests for Federal aid, but need only affirm when requested that the assurance submitted continues in effect.

(c) *Supplementation of Assurance.* The Commissioner may require supplementation of HEW Form 441 when he has reasonable cause to believe that there is a failure to comply with any provision of Title VI or the HEW Regulation.

§ 181.6 Systems Under Federal Court Order for Desegregation

(a) *Submission of Order.* A school system under a Federal court desegregation order which meets the requirements of the HEW Regulation may submit, as evidence of compliance with Title VI, a copy of the court order, together with an assurance that it will comply with the order, including any future modification.

(b) *Resubmission Not Required.* A school system under a court order accepted by the Commission need not submit another copy, but must submit any modification not previously submitted.

(c) *Revision of Court Orders.* A school system under a court order for desegregation which is not in accord with current judicial standards is subject to legal action by the Department of Justice, or by the parties to the original suit, to modify the order to meet current standards.

§ 181.7 Systems With Voluntary Desegregation Plans

(a) *Submission of Form 441-B.* A school system with a voluntary desegregation plan must provide an assurance that it will abide by the applicable requirements for such plans contained in this Statement of Policies. Such assurance may be given by submitting HEW Form 441-B to the Commissioner. After April 15, 1966 commitments of funds for new activities will be subject to deferral for school systems which have failed to submit HEW Form 441-B.

(b) *Changing Type of Plan.* A school system may change from one type of desegregation plan to another if such action would eliminate segregation and all other forms of discrimination more expeditiously. A school system planning to change the type of its plan must submit a new plan meeting the requirements of this Statement of Policies, together with HEW Form 441-B, for a determination by the Commissioner as to the adequacy of the plan to accomplish the purposes of Title VI.

(c) *Retaining Present Type of Plan.* A school system with a desegregation plan accepted by the Commissioner need not resubmit its plan if it intends to continue under the same type of plan. If a plan accepted by the Commissioner fails to meet any requirement under this Statement of Policies, the submission of HEW Form 441-B will be deemed to amend the plan so that it will meet such requirement. Amendments to the plan are not to be submitted unless requested. However, certain supporting materials must be submitted, as provided in Subparts B, C, D, and F below.

(d) *Initial Submittal of Plans.* If no desegregation plan has been submitted or accepted for a school system, HEW Form 441-B and a plan meeting the requirements of this Statement of Policies must be submitted.

[§§ 181.8 through 181.10 reserved]

Subpart B—*Basic Requirements for All Voluntary Desegregation Plans*

§ 181.11 Various Types of Desegregation Plans

It is the responsibility of a school system to adopt and implement a desegregation plan which will eliminate the dual system and all other forms of discrimination as expeditiously as possible. No single type of plan is appropriate for all school systems. In some cases, the most expeditious means of desegregation is to close the schools originally established for students of one race, particularly where they are small, inadequate and to assign all the students and teachers to desegregated schools. Another appropriate method is to reorganize the grade

structure of schools originally established for students of different races so that these schools are fully utilized, on a desegregated basis, although each school contains fewer grades. In some cases desegregation is accomplished by the establishment of non-racial attendance zones. Under certain conditions, a plan based on free choice of school may be a way to undertake desegregation. In certain cases the purposes of Title VI may be most expeditiously accomplished by a plan applying two or more of the foregoing procedures to certain schools or different grade levels. Based on consideration of all the circumstances of a particular school system, the Commissioner may determine that its desegregation plan is not adequate to accomplish the purposes of Title VI, in which case he may require the adoption of an alternative plan. In any case where the State education agency is pursuing policies and programs for expediting the elimination of the dual school structure, the Commissioner will consider this factor in determining whether a particular type of plan is adequate for any given school system in such State.

§ 181.12 Student Assignment Practices

Title VI precludes a school system from any action or inaction designed to perpetuate or promote segregation or any other form of discrimination, or to limit desegregation or maintain what is essentially a dual school structure. Any educational opportunity offered by a school system must be available to students without regard to race, color, or national origin. In particular, any academic tests or other procedures used in assigning students to schools, grades, classrooms, sections, courses of study or for any other purpose must be applied

uniformly to all students without regard to race, color, or national origin. Curriculum, credit and promotion procedures must not be applied in such a way as to penalize or hamper students who transfer from one school to another pursuant to a desegregation plan.

§ 181.13 Faculty and Staff

(a) *Desegregation of Staff.* The racial composition of the professional staff of a school system, and of the schools in the system, must be considered in determining whether students are subjected to discrimination in educational programs. Each school system is responsible for correcting the effects of all past discriminatory practices in the assignment of teachers and other professional staff.

(b) *New Assignments.* Race, color, or national origin may not be a factor in the hiring or assignment to schools or within schools of teachers and other professional staff, including student teachers and staff serving two or more schools, except to correct the effects of past discriminatory assignments.

(c) *Dismissals.* Teachers and other professional staff may not be dismissed, demoted, or passed over for retention, promotion, or rehiring, on the ground of race, color, or national origin. In any instance where one or more teachers or other professional staff members are to be displaced as a result of desegregation, no staff vacancy in the school system may be filled through recruitment from outside the system unless the school officials can show that no such displaced staff member is qualified to fill the vacancy. If as a result of desegre-

gation, there is to be a reduction in the total professional staff of the school system, the qualifications of all staff members in the system must be evaluated in selecting the staff members to be released.

(d) *Past Assignments.* The pattern of assignment of teachers and other professional staff among the various schools of a system may not be such that schools are identifiable as intended for students of a particular race, color, or national origin, or such that teachers or other professional staff of a particular race are concentrated in those schools where all, or the majority of, the students are of that race. Each school system has a positive duty to make staff assignments and reassignments necessary to eliminate past discriminatory assignment patterns. Staff desegregation for the 1966-67 school year must include significant progress beyond what was accomplished for the 1965-66 school year in the desegregation of teachers assigned to schools on a regular full-time basis. Patterns of staff assignment to initiate staff desegregation might include, for example: (1) Some desegregation of professional staff in each school in the system, (2) the assignment of a significant portion of the professional staff of each race to particular schools in the system where their race is a minority and where special staff training programs are established to help with the process of staff desegregation, (3) the assignment of a significant portion of the staff on a desegregated basis to those schools in which the student body is desegregated, (4) the reassignment of the staff of schools being closed to other schools in the system where their race is a minority, or (5) an alternative pattern of assignment which will make comparable progress in bringing about staff desegregation successfully.

(a) *General.* Each school system is responsible for removing any segregation and any other form of discrimination affecting students in connection with all transportation, athletics, and other extra-curricular activities) that may be conducted or sponsored by or affiliated with the schools of the system.

(b) *Specific Situations.*

(1) A student attending school for the first time on a desegregated basis may not be subject to any disqualification or waiting period for participation in activities and programs, including athletics, which might otherwise apply because he is a transfer student.

(2) If transportation services are furnished, sponsored or utilized by a school system, dual or segregated transportation systems and any other form of discrimination must be eliminated. Routing and scheduling of transportation must be planned on the basis of such factors as economy and efficiency, and may not operate to changed to the extent necessary to comply with this provision.

(3) All school-related use of athletic fields, meeting rooms, and all other school-related services, facilities, activities, and programs, such as commencement exercises and parent-teacher meetings, which are open to persons other than enrolled students, must be open to all such persons and must be conducted without segregation or any other form of discrimination.

(4) All special educational programs, such as preschool, summer school and adult education, and any educational program newly instituted, must be conducted

without segregation or any other form of discrimination. Free choice desegregation procedures normally may not be applied to such programs.

§ 181.15 Unequal Educational Programs and Facilities

In addition to the changes made in student assignment practices under its desegregation plan, each school system is responsible for removing all other forms of discrimination on the ground of race, color, or national origin. For example, some school systems still maintain small, inadequate schools that were originally established for students of a particular race and are still used primarily or exclusively for the education of students of such race. If the facilities, teaching materials, or educational program available to students in such a school are inferior to those generally available in the schools of the system, the school authorities will normally be required immediately to assign such students to other schools in order to discontinue the use of the inferior school.

§ 181.16 Attendance Outside School System of Residence

No arrangement may be made nor permission granted school in another school system in any case (1) where the result would tend to limit desegregation or maintain what is essentially a dual school structure in either system, or (2) where such attendance is not available to all students without regard to race, color, or national origin.

§ 181.17 Official Support for Desegregation Plan

(a) *Community Support.* School officials must take steps to encourage community support and acceptance of their desegregation plan. They are responsible for preparing students, teachers and all other personnel, and the community in general, for the successful desegregation of the school system.

(b) *Information to the Public.* Full information concerning the desegregation plan must be furnished freely to the public and to all television and radio stations and all newspapers serving the community. Copies of all reports on student and staff assignments required under § 181.18 below must be available for public inspection at the office of the Superintendent of the school system.

(c) *Protection of Persons Affected.* Each school system is responsible for the effective implementation of its desegregation plan. Within their authority, school officials are responsible for the protection of persons exercising rights under, or otherwise affected by, the plan. They must take appropriate action with regard to any student or staff member who interferes with the successful operation of the plan, whether or not on school grounds. If officials of the school system are not able to provide sufficient protection, they must seek whatever assistance is necessary from other appropriate officials.

§ 181.18 Reports

(a) *Anticipated Enrollment.* By April 15 of each year, or by 15 days after the close of the spring choice period in the case of plans based on free choice of schools,

each school system must report to the Commissioner the anticipated student enrollment, by race, color, or national origin, and by grade of each school, for the following school year. The report submitted for the 1966-67 school year must also include the comparable data for the 1965-66 school year. Any subsequent substantial change in anticipated enrollment affecting desegregation must be reported promptly to the Commissioner.

(b) *Planned Staff Assignments.* By April 15 of each year, each school system must report to the Commissioner the planned assignments of professional staff to each school for the following year, by race, color, or national origin and by grade, or where appropriate, by subject taught or position held. The report for April 15, 1966 must also include the comparable data for the 1965-66 school year. Any subsequent change in planned staff assignments affecting staff desegregation must be reported promptly to the Commissioner.

(c) *Actual Data.* As soon as possible after the opening of its schools in the fall, but in any case within 30 days thereafter, each school system must determine and promptly report to the Commissioner the actual data for the items covered in the reports called for under (a) and (b) above.

(d) *Attendance Outside System of Residence.* The reports called for under (a) and (c) above must include a statement covering (1) all students who reside within the boundaries of the school system but attend school in another system, and (2) all students who reside outside but attend a school within the system. This statement must set forth, for each group of students included

in (1) and (2) above, the number of students, by race, color, or national origin, by grade, by school and school system attended, and by school system of residence.

(e) *Consolidation or Litigation.* A school system which is to undergo consolidation with another system or any other change in its boundaries, or which is involved in any litigation affecting desegregation, must promptly report the relevant facts and circumstances to the Commissioner.

(f) *Other Reports.* The Commissioner may require a school system to submit other reports relating to its compliance with Title VI.

§ 181.19 Records

A school system must keep available for not less than three years all records relating to personnel actions, transportation, including routes and schedules, and student assignments and transfers, including all choice forms and transfer applications submitted to the school system. The Commissioner may require retention for a longer period in individual cases.

[§§ 181.20 through 181.30 reserved]

Subpart C—*Additional Requirements for Voluntary Desegregation Plans Based on Geographic Attendance Zones*

§ 181.31 General

A voluntary desegregation plan based in whole or in part on geographic attendance zones must meet the re-

quirements of this Subpart for all students whose assignment to schools is determined by such zones. The general requirement for desegregation plans set forth elsewhere in this Statement of Policies are also applicable.

§ 181.32 Attendance Zones

A single system of non-racial attendance zones must be established. A school system may not use zone boundaries or feeder patterns designed to perpetuate or promote segregation, or to limit desegregation or maintain what is essentially a dual school structure. A school system planning (1) to desegregate certain grades by means of geographic attendance zones and other grades by means of free choice of schools, or (2) to include more than one school of the same level in one or more attendance zones and to offer free choice of all schools within such zones, must show that such an arrangement will most expeditiously eliminate segregation and all other forms of discrimination. In any such case, the procedures followed for the offer, exercise and administration of free choice of schools must conform to the provisions of Subpart D below.

§ 181.33 Assignment to School in Zone of Residence

Regardless of any previous attendance at another school, each student must be assigned to the school serving his zone of residence, and may be transferred to another school only in those cases which meet the following requirements:

(a) *Transfer for Special Needs.* A student who requires a course of study not offered at the school serving

his zone, or who is physically handicapped, may be permitted, upon his written application, to transfer to another school which is designed to fit, or offers courses for, his special needs.

(b) *Minority Transfer Policy.* A school system may (1) permit any student to transfer from a school where students of his race are a majority to any other school, within the system, where students of his race are a minority, or (2) assign students on such basis.

(c) *Special Plan Provisions.* A student who specifically qualifies to attend another school pursuant to the provisions of a desegregation plan accepted by the Commissioner may be permitted, upon his written application, to transfer to such other school.

§ 181.34 Notice

(a) *Individual Notice.* On a convenient date between March 1 and April 30 in each year, each school system must distribute, by first class mail, a letter to the parent, or other adult person acting as parent, of each student who is then enrolled, except high school seniors expected to graduate, giving the name and location of the school to which the student has been assigned for the coming school year pursuant to the desegregation plan, and information concerning the bus service between his school and his neighborhood. All these letters must be mailed on the same day. Each letter must be accompanied by a notice, in a form prescribed by the Commissioner, explaining the desegregation plan. The same letter and notice must also be furnished, in person or by mail, to the parent of each prospective student, including each

student planning to enter the first grade or kindergarten, as soon as the school system learns that he plans to enroll.

(b) *Published Notice.* The school system must arrange for the conspicuous publication of an announcement, identical with the text of the notice provided for under (a) above, in the newspaper most generally circulated in the community, on or shortly before the date of mailing under (a) above. Publication as a legal notice is not sufficient. Whenever any revision of attendance zones is proposed, the school system must similarly arrange for the conspicuous publication of an announcement at least 30 days before any change is to become effective, naming each school to be affected and describing the proposed new zones. Copies of all material published hereunder must also be given at that time to all television and radio stations serving the community.

(c) *Maps Available to Public.* A street or road map showing the boundaries of, and the school serving, each attendance for public inspection at the office of the Superintendent. Each school in the system must have freely available for public inspection a map showing the boundaries of its attendance area.

§ 181.35 Reports

(a) *Attendance Zones.* The report submitted under § 181.18(a) by April 15 of each year must be accompanied by a map, which must show the name and location of each school facility planned to be used during the coming school year, the attendance zones for each school in effect during the current school year, and any

changes in the attendance zones planned for the coming school year. The map need not be of professional quality. A clipping of each newspaper announcement and any map published under § 181.34 (b) or (c) above must be sent to the Commissioner within three days after publication and; in the case of proposed revisions, must be accompanied by data showing the estimated change in attendance, by race, color, or national origin and by grade, and in the racial composition of the professional staff, at each school to be affected.

(b) *Attendance Outside Zone of Residence.* Whenever a student is permitted to attend a school other than that serving his zone of residence, and whenever a request for such attendance is denied, the school system must retain records showing (1) the school and grade applied for, (2) the zone of the student's residence and his grade therein, (3) the race, color, or national origin of the student, (4) the reason stated for the request, and (5) the reason the request is granted or denied. Whenever the total number of transfers permitted from any school exceeds two percent of the student enrollment at that school, the relevant facts must be reported promptly to the Commissioner.

[§§ 181.36 through 181.40 reserved]

Subpart D—*Additional Requirements for Voluntary Desegregation Plans Based on Free Choice of Schools*

§ 181.41 General

A voluntary desegregation plan based in whole or in part on free choice of schools must meet the requirements of this Subpart for all students whose assignment to

schools is determined by free choice. The general requirements for desegregation plans set forth elsewhere in this Statement of Policies are also applicable.

§ 181.42 Who May Exercise Choice

A choice of schools may be exercised by a parent or other adult person serving as the student's parent. A student may exercise his own choice if he (1) is exercising a choice for the ninth or a higher grade, or (2) has reached the age of fifteen at the time of the exercise of choice. Such a choice by a student is controlling unless a different choice is exercised for him by his parent, or other adult person acting as his parent, during the period in which the student exercises his choice. Each reference in this Subpart to a student exercising a choice means the exercise of the choice by a parent or such other adult, or by the student himself, as may be appropriate under this provision.

§ 181.43 Annual Mandatory Exercise of Choice

Each student must be required to exercise a free choice of schools once annually. A student may not be enrolled or assigned to a school without exercising his choice, except as provided in § 181.45 below.

§ 181.44 Choice Period

A period of at least 30 days must be provided for exercising choice, to commence no earlier than March 1 and to end no later than April 30, preceding the school year for which choice is to be exercised. The Commissioner may require an additional period or different

dates for a particular school system. No preference in school assignment may be given on the basis of an early exercise of choice during the choice period.

§ 181.45 Failure To Exercise Choice

A failure to exercise a choice within the choice period does not excuse a student from exercising his choice, which may be done at any time before he commences school for the year with respect to which the choice applies. However, any such late choice must be subordinated to the choices of students who exercised choice during the choice period. If by a week after school opens there is any student who has not yet exercised his choice of school, he must be assigned to the school nearest his home where space is available. Standards for determining available space must be applied uniformly throughout the system.

§ 181.46 Letters to Parents, Notices, and Choice Forms

(a) *Mailings.* On the first day of the choice period, each school system must distribute, by first class mail, a letter, an explanatory notice, and a choice form, to the parent or other adult person acting as parent of each student who is then enrolled, except high school seniors expected to graduate, together with a return envelope addressed to the Superintendent. The texts for the letter, notice, and choice form to be used must be in a form prescribed by the Commissioner.

(b) *Extra Copies.* Extra copies of the letter, the notice, and the choice form must be freely available to parents, students, prospective students, and the general

public, at each school in the system and at the office of the Superintendent.

(c) *Content of Choice Form.* Unless otherwise authorized or required by the Commissioner, each choice form, as prepared by the school system for distribution, (1) must set forth the name and location of, and the grades offered at, each school, and (2) may inquire of the person exercising the choice only the name, address, and age of the student, the school and grade currently or most recently attended by the student, the school chosen, the signature of one parent or other adult person serving as parent or, where appropriate under § 181.42 above, the signature of the student, and the identity of the person signing. If necessary to provide information required by §§ 181.18 and 181.19 above, or for other reports required by the Commissioner, the choice may also ask the race, color, or national origin of the student. No statement of reasons for a particular choice, or any other information, or any witness or other authentication, may be required or requested. No other choice form, including any pupil placement law form may be used by the school system in connection with the choice of a school.

(d) *Return of Choice Form.* At the option of the person completing the choice form, it may be returned by mail or by hand to any school in the school system or to the office of the Superintendent.

(e) *Choices Not on Official Form.* Exercise of choice may also be made by the submission in like manner of any other writing which sufficiently identifies the student and indicates that he has made a choice of a school.

§ 181.47 Prospective Students

Each prospective student, including each student planning to enter the first grade or kindergarten, must be required to exercise a free choice of schools before enrollment. Each such student must be furnished a copy of the prescribed letter, notice, and choice form, by mail or in person, on the date the choice period opens or as soon thereafter as the school system learns that he plans to enroll. Each must be given an opportunity to exercise his choice during the choice period. A prospective student exercising his choice after the choice period must be given at least one week to do so.

§ 181.48 Choice May Not Be Changed

Once a choice has been submitted, it may not be changed for the school year to which it applies, whether during the choice period, after the choice period, or during that school year, except on request (1) in cases meeting the conditions set forth in § 181.50 below, (2) in case of a change of residence to a place where another school serving the student's grade level is closer than the school to which he is assigned under these provisions, and (3) in case of a compelling hardship. A student who cannot enter the school of his choice because the grade he is to enter is not offered at that school must be promptly notified as soon as this is known and must be given the same opportunity to choose another school as is provided a prospective student under § 181.47 above.

§ 181.49 Assignment According to Choice

No choice may be denied in assigning students to schools for any reason other than overcrowding. In cases

where overcrowding would result at one or more schools from the choices made, preference must be given on the basis of the proximity of schools to the homes of students, without regard to race, color, or national origin. No preference may be given to students for prior attendance at a school if such preference would deny other students their free choice of schools under the plan. In cases where this provision would result in unusual difficulty involving, for instance, students not being able to finish their senior year in a particular school, or students being unable to attend school with other members of the same family, or at a school having special courses required by a student, the relevant facts may be brought to the attention of the Commissioner for consideration of alternative procedures. Any student whose choice is denied under these provisions must be notified in writing promptly and given his choice of each school in the system serving his grade level where space is available. Standards for determining overcrowding and available space that are applied uniformly throughout the system must be used if any choice is to be denied. Each student and his parent, or other adult person acting as parent, must be notified in writing of the name and location of the school to which the student is assigned hereunder promptly upon completion of processing his first or any second choice. A school system may, at its option, give preference to any student whose choice is for a school at which students of his race are a minority.

§ 181.50 Transfers for Special Needs

Each student must attend the school to which he is assigned under the foregoing provisions, except that any student who requires a course of study not offered at

that school, or who is physically handicapped, may be permitted, upon his written application, to transfer to another school which is designed to fit, or offers courses for, his special needs.

§ 181.51 No Limitation of Choice; Transportation

No factor, such as a requirement for health or birth records, academic or physical examinations, the operation of the school transportation system, or any other factor except overcrowding, may limit or affect the assignment of students to schools on the basis of their choices. Where transportation is generally provided, buses must be routed to the maximum extent feasible so as to serve each student choosing any school in the system. In any event, every student choosing either the formerly white or the formerly Negro school (or other school established for students of a particular race, color, or national origin) nearest his residence must be transported to the school to which he is assigned under these provisions, whether or not it is his first choice, if that school is sufficiently distant from his home to make him eligible for transportation under generally applicable transportation rules.

§ 181.52 Officials Not To Influence Choice

No official, teacher, or employee of the school system may require or request any student or prospective student to submit a choice form during the choice period other than by the prescribed letter, notice, and choice form. After the choice period, the school system must make all reasonable efforts to obtain a completed choice form from any student who has not exercised a choice.

However, at no time may any official, teacher, or employee of the school system, either directly or indirectly, seek to influence any parent, student, or any other person involved, in the exercise of a choice, or favor or penalize any person because of a choice made. Information concerning choices made by individual students or schools to which they are assigned may not be made public.

§ 181.53 Public Notice

On or shortly before the date the choice period opens, the school system must arrange for the conspicuous publication of a notice describing the desegregation plan in the newspaper most generally circulated in the community. The text of the notice must be in a form prescribed by the Comissioner. Publication as a legal notice is not sufficient. Copies of this notice must also be given at that time to all radio and television stations serving the community. Any other announcement published by the school system concerning enrollment, such as might be made in connection with scheduling pre-enrollment procedures for prospective first grade students, must (1) state clearly that under the desegregation plan a choice of school is required for each student whose choice has not yet been exercised, (2) describe and state where copies of the prescribed letter, notice and choice form may be freely obtained in person, or by letter or telephone request, and (3) state the period during which the choice may be exercised.

§ 181.54 Requirements for Effectiveness of Free Choice Plans

A free choice plan tends to place the burden of deseg-

regation on Negro or other minority group students and their parents. Even when school authorities undertake good faith efforts to assure its fair operation, the very nature of a free choice plan and the effect of longstanding community attitudes often tend to preclude or inhibit the exercise of a truly free choice by or for minority group studnts.

For these reasons, the Commissioner will scrutinize with special care the operation of voluntary plans of desegregation in school systems which have adopted free choice plans.

In determining whether a free choice plan is operating fairly and effectively, so as to materially further the orderly achievement of desegregation, the Commissioner will take into account such factors as community support for the plan, the efforts of the school system to eliminate the identifiability of schools on the basis of race, color, or national origin by virtue of the composition of staff or other factors, and the progress actually made in eliminating past dicrimination and segregation.

The single most substantial indication as to whether a free choice plan is actually working to eliminate the dual school structure is the extent to which Negro or other minority group students have in fact transferred from segregated schools. Thus, when substantial desegregation actually occurs under a free choice plan, there is strong evidence that the plan is operating effectively and fairly, and is currently acceptable as a means of meeting legal requirements. Conversely, where a free choice plan results in little or no actual desegregation,

or where, having already produced some degree of desegregation, it does not result in substantial progress, there is reason to believe that the plan is not operating effectively and may not be an appropriate or acceptable method of meeting constitutional and statutory requirements.

As a general matter, for the 1966-67 school year the Commissioner will, in the absence of other evidence to the contrary, assume that a free choice plan is a viable and effective means of completing initial stages of desegregation in school systems in which a substantial percentage of the students have in fact been transferred from segregated schools. Where a small degree of desegregation has been achieved and, on the basis of the free choice registration held in the spring of 1966, it appears that there will not be a substantial increase in desegregation for the 1966-67 school year, the Commissioner will review the working of the plan and will normally require school officials to take additional actions as a prerequisite to continued use of a free choice plan, even as an interim device.

In districts with a sizable percentage of Negro or other minority group students, the Commissioner will, in general, be guided by the following criteria in scheduling free choice plans for review:

(1) If a significant percentage of the students, such as 8 percent or 9 percent, transferred from segregated schools for the 1965-66 school year, total transfers on the order of at least twice that percentage would normally be expected.

(2) If a smaller percentage of the students, such as 4 percent or 5 percent, transferred from segregated schools for the 1965-66 school year, a substantial increase in transfers would normally be expected, such as would bring the total to at least triple the percentage for the 1965-66 school year.

(3) If a lower percentage of students transferred for the 1965-66 school year, then the rate of increase in total transfers for the 1966-67 school year would normally be expected to be proportionately greater than under (2) above.

(4) If no students transferred from segregated schools under a free choice plan for the 1965-66 school year, then a very substantial start would normally be expected, to enable such a school system to catch up as quickly as possible with systems which started earlier. If a school system in these circumstances is unable to make such a start for the 1966-67 school year under a free choice plan, it will normally be required to adopt a different type of plan.

Where there is substantial deviation from these expectations, and the Commissioner concludes, on the basis of the choices actually made and other available evidence, that the plan is not operating fairly, or is not effective to meet constitutional and statutory requirements, he will require the school system to take additional steps to further desegregation.

Such additional steps may include, for example, reopening of the choice period, additional meetings with parents and civic groups, further arrangements with

State or local officials to limit opportunities for intimidation, and other further community preparation. Where schools are still identifiable on the basis of staff composition as intended for students of a particular race, color, or national origin, such steps must in any such case include substantial further changes in staffing patterns to eliminate such identifiability.

If the Commissioner concludes that such steps would be ineffective, or if they fail to remedy the defects in the operation of any free choice plan, he may require the school system to adopt a different type of desegregation plan.

§ 181.55 Reports

(a) *Supporting Materials.* Each school system must submit to the Commissioner a copy of the letter, notice, and choice form, all as prepared by the school system for distribution, within three days after their first distribution, and must submit a clipping of all newspaper announcements published in accordance with § 181.53 above within three days after publication.

(b) *Data on Choices Not Being Honored.* In any case, including the case of conflicting choices under § 181.42 above, where a student chooses a school where he would be in a racial minority, and (1) he is to be majority, or (2) the school system proposes not to process his choice for any reason, the relevant facts must be reported promptly to the Commissioner.

(c) *Transfers for Special Needs.* Wherever a student is permitted, under §§ 181.48 or 181.50 above, to

attend a school other than the school to which he is or would be assigned under the other applicable provisions hereof, and whenever a request for such attendance is denied, the school system must retain records showing (1) the school and grade applied for, (2) the school and grade to be transferred from, (3) the race, color, or national origin of the student, (4) the reason stated for the request, and (5) the reason the request is granted or denied. Whenever the total number of transfers permitted from any school exceeds two percent of the student enrollment at that school, the relevant facts must be reported promptly to the Commissioner.

[§§ 181.56 through 181.60 reserved]

Subpart E—*Miscellaneous Provisions*

§ 181.61 How To Submit Reports

Each report to the Commissioner required under this Statement of Policies must be sent by first class mail addressed to the Equal Educational Opportunities Program, U. S. Office of Education, Washington, D. C., 20202.

§ 181.62 Alternative Administrative Procedures

If an administrative procedure provided for under this Statement of Policies is not administratively feasible in a particular situation, the Commissioner may accept an alternative procedure if he determines that it will accomplish the same purpose.

§ 181.63 Revision of Statement of Policies

The Commissioner may modify this Statement of Pol-

icies as may be necessary to accomplish the purposes of Title VI.

§ 181.64 Copies of Documents for State Agencies

Each school system submitting any plan form or report to the Commissioner under this Statement of Policies must also submit a copy of such form or report to the appropriate State education agency.

§ 181.65 Choice Period Already Begun

In the event that any school system with a desegregation plan based on free choice has begun or completed its free choice period for the 1966-67 school year prior to the date of issue of this Statement of Policies, the school system must immediately report to the Commissioner its proposals for adapting its free choice procedures in such a way as to make them substantially conform to the provisions of this Statement of Policies.

§ 181.66 Definitions

(a) The term "Commissioner" means the U. S. Commission of Education or any official acting under assignment or delegation from him to carry out any of his functions under this Statement of Policies.

(b) The term "discrimination" means discrimination on the ground of race, color, or national origin.

(c) The term "dual school structure" means a system of separate school facilities for students based on race, color, or national origin.

(d) The term "HEW Form 441" means the printed

document provided for the use of certain school systems by the U. S. Department of Health, Education, and Welfare, entitled "Assurance of Compliance with the Department of Health, Education, and Welfare Regulation under Title VI of the Civil Rights Act of 1964."

(e) The term "HEW Form 441-B" means the printed document provided for the use of certain school systems by the U. S. Department of Health, Education, and Welfare entitled "Assurance of Compliance with the Revisd Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964."

(f) The term "HEW Regulation" means the Regulation issued pursuant to Title VI of the Civil Rights Act of 1964 by the U.S. Department of Health, Education, and Welfare (Part 80, of Title 45, Code of Federal Regulations).

(g) The term "parent" means an adult individual who exercises parental control over, or is otherwise acting as parent of, a student or prospective student.

(h) The term "school official" shall include, but is not limited to, any person who serves on the governing board of a school system, or attends meetings of such board in an official capacity, and all administrative and supervisory personnel of a school system.

(i) The term "school system" means, as the context may require, either (1) a legally constituted school authority (such as a local board of education) which has administrative control of one or more elementary or secondary schools, (2) the geographic area over which

any such school authority has administrative control for school purposes, or (3) the schools and facilities over which any such school authority has administrative control.

(j) The term "Statement of Policies" means this Revised Statement of Policies for School Desegregation Plans under Title VI of the Civil Rights Act of 1964.

(k) The term "Title VI" means Title VI of the Civil Rights Act of 1964 (PL 88-352, 42 USC 2000d to 2000d-4).

[§§ 181.67 to 181.70 reserved]

EXHIBIT "J"

Excerpts from the Deposition of Herbert C. Kane, Area Director of Area IV of the Equal Education Opportunity Program of the Office of Education of the Department of Health, Education and Welfare, which area includes the State of Louisiana.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

Pine Bluffs Division

Civil Action No. PB66C94

Washington, D. C.,

Thursday, January 26, 1967

DERMOTT SPECIAL SCHOOL DISTRICT
OF CHICOT COUNTY,

Plaintiff

versus

JOHN W. GARDNER, As Secretary of the
Department of Health, Education and Welfare
and
HAROLD HOWE, II, AS UNITED STATES
COMMISSIONER OF EDUCATION,

Defendants.

Deposition of HERBERT C. KANE

a witness, called for examination by counsel for the plaintiff, pursuant to agreement of counsel, in Room 3523, General Services Administration Region 3, 7th and D Streets, Southwest, Washington, D. C., beginn-

ing at 11:00 a.m., before Adam A. Giebel, a Notary Public in and for the District of Columbia, when were present on behalf of the respective parties:

A. That is correct.

Q. Now, what is desegregation as you use the term in that context?

A. Desegregation as I use the term, involves a situation where so far as the pupils are concerned each of the pupils has an opportunity to attend school with members either of majority or a minority group. Whether the differentiation is based upon race, color or national origin. And over and above the opportunity that a certain amount at least of progress in this area be demonstrated in each of the school districts. And so far as the faculty is concerned that the faculty assignments be such as to provide the pupils with the opportunity to be taught by members of the minority and majority again as the case might be.

Q. So desegregation as it is administered by your office, comprehends not only the opportunity to freely choose a school but also comprehends the exercise of that opportunity by some significant number of students that results in them being in a desegregated situation?

A. That is correct.

Q. Now, I take it from what you have already testified, that in the Dermott School District your office is satisfied that the opportunity was extended but is dis-

satisfied with the number of persons availing themselves of the opportunity.

BY MR. LIGHT:

Q. How many more Negro students does the Dermott School District need to get into a desegregated situation during this school year to have its eligibility restored by your office for Federal financial assistance?

A. Assuming that the faculty meets the requirements — MR. SMITH: Before he answers that question it should be pointed out that he has already stated that he does not make the ultimate decision on where a school district is in compliance. He makes only recommendations. It is not proper to ask him how many students would be required for compliance.

BY MR. LIGHT:

Q. Mr. Kane, I will amend my question to ask you how many more Negro students in a desegragation situation would be required in order to prompt you to recommend that the district status be changed from non-compliance to one of compliance?

A. I would assume that approximately 50 more Negro students under these circumstances would indicate that the plan was working to some degree.

Q. The complaint in this lawsuit alleges that there are 12 Negro students in the previously white school and assuming that figure to be correct, or approximately correct, that would be your expection that the district should have approximately 60 or 62 Negro stu-

dents in the previously white schools in this current year in order to be in compliance?

* * *

MR. FOSTER: Excuse me, but are we speculating again in terms of what you would like to see in order to recommend that the status be restored?

THE WITNESS: Yes.

MR. LIGHT: I think the record is clear on that.

MR. FOSTER: Okay.

BY MR. LIGHT:

Q. Under the policies of your office what procedure do you expect the Dermott School District to follow in placing this additional some 50 Negro students in a desegregated situation-

A. Well, this is for the school board. The onus is not upon the office but rather upon the school board to desegregate the schools.

Q. If the board arbitrarily selected 50 Negro students and assigned them to the previously white school would that satisfy your office?

A. Yes, that is one of the methods that could be used.

Q. What suggestions has your office made to the Dermott School District with respect to bringing itself into compliance with your policies?

A. At what point? We have made innumerable suggestions.

Q. Well, I would just like for you to tell me all that you recall that have been made to this school district.

A. Well, we have suggested among other things that the choice period be re-opened and re-run. We have suggested that —

* * *

Q. Are those all the states?

A. That is right.

Q. So the amount of integration in terms of percentage of the minority groups that have availed themselves of it has varied rather widely in the states in your areas of responsibility?

A. There has been a wide variation but the question of — the way the question is put "to avail themselves of it" I do not think can be answered in this way because in many instances we have school districts that have completely desegregated.

Q. Now, what do you mean by completely desegregated?

A. By closing the Negro or the white school and teaching all the children in a single educational institution, a single school or school grouping.

Q. That is the ultimate objective of the enforcement of the guidelines, is it not?

A. That is correct. The ultimate objective is to eliminate the dual school system and there are other districts that have by virtue of geographic plans, achieved this degree of desgregation, so that the others that have been pairing or assignment, the implication in the question that it was all free choice therefore must, of necessity, be watched.

Q. In the areas for which you are responsible, has the enforcement of the guidelines tended to achieve more racial balance than existed before the guidelines were enforced?

MR. FOSTER: Objection to the use of the term "racial balance." I believe it would be a term of art. I think it would call for a conclusion on the part of the witness that would be based on material that hasn't been yet covered and certainly is not in evidence.

THE WITNESS: I don't know what the term "racial balance" means.

BY MR. LIGHT:

Q. Is this a term with which you are familiar, Mr. Kane?

A. It is a term I have heard, but I have never been able to find a definition.

Q. Well, let's take the Dermott School as a concrete example.

A. All right.

Q. If the pleadings are correct there are now 12 Negro children and several hundred white children in that school. Is this more racially balanced that it was when all the Negro children went to the Chicot County school and all of the white children went to the Dermott school?

A. I don't know. I have no frame of reference for the term.

Q. Does the Office of Education to your knowledge have any policy respecting the use of the term "racial balance" in administration of its business?

A. Not that I know of.

Q. Isn't there in fact a policy to treat that term just as you now treat it, by denying any knowledge of what it means?

MR. FOSTER: Objection, the witness previously answered the question that to his knowledge there is no policy in the Office of Education to refer to the term "racial balance" in any given way.

BY MR. LIGHT:

Q. Mr. Kane, you are the chief officer to enforce the guidelines for in an area of five —

A. Four.

Q. Four?

(Discussion off the record.)

BY MR. LIGHT:

Q. Mr. Kane, you are the Chief enforcement officer to enforce the guidelines in the area consisting of five states of the Union?

A. That is correct.

Q. As such, are you aware of any limitations or inhibitions on your official conduct in the field of atempting to achieve racial balance among students or faculty in the schools in your district?

A. There is a referral to racial balance, I believe, in Title IV of the Civil Rights Act. However, I am not the individual who is responsible for Title IV operations. My responsibility was within Title VI.

Q. You are aware, though, that the Civil Rights Act of 1964 contains the terminology "racial balance" and also "racial imbalance."

A. I believe it does, yes.

Q. But those references in the Act don't affect your responsibilities and, therefore, you haven't studied the matter any more than you have just indicated here?

A. That is correct.

Q. And in the discharge of the duties that you presently have are you aware of any way that the references in the Act to racial balance or imbalance have affected your job or your duties?

A. No. They have nothing at all to do with the implementation of Title VI.

Q. Rightly or wrongly, you have been able to discharge your obligations in this job without being aware of any limitations on the discharge of your duties by those terms in the Civil Righst Act?

A. That is right.

Q. You haven't paid any attention to them, is that right?

A. Right.

Q. Now, Mr. Kane, assume for a moment without implying

EXHIBIT "K"

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No._____

CADDO PARISH SCHOOL BOARD, ET AL.,
Petitioners

versus

UNITED STATES OF AMERICA
Respondents

* * *

No._____

THE BOSSIER PARISH SCHOOL BOARD, ET AL.,
Petitioners

versus

UNITED STATES OF AMERICA
Respondents

* * *

No._____

JACKSON PARISH SCHOOL BOARD, ET AL.,
Petitioners

versus

MARGARET M. JOHNSON, ET AL.,
Respondents

* * *

No._____

CLAIBORNE PARISH SCHOOL BOARD, ET AL.,
Petitioners

versus

YVORNIA DECAROL BANKS, ET AL.,
Respondents

* * *

No._____

CITY OF MONROE, LOUISIANA, ET AL.,
Petitioners

versus

JIMMY ANDREWS, ET AL.,
Respondents

* * *

No._____

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL,
Petitioners

versus

CLIFFORD EUGENE DAVIS, JR., ET AL.,
Respondents

APPLICATION FOR STAY AND/OR SUSPENSION OF MANDATE OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Hugo L. Black, Associate Justice of the Supreme Court of the United States and Circuit

Justice for the Fifth Circuit:

Petitioners, Caddo Parish School Board, et al., Bossier Parish School Board, et al., Jackson Parish School Board, et al., Claiborne Parish School Board, et al., City of Monroe, Louisiana, et al., East Baton Rouge Parish School Board, et al., all of the State of Louisiana pray that an order be entered staying and/or suspending the mandate of the United States Court of Appeals for the Fifth Circuit, which issued in an opinion dated March 29, 1967, pending the filing of a petition for certiorari and a final determination of the matter by this Court. In support of this application, petitioners respectfully show as follows:

1. Your petitioners, six school boards of the State of Louisiana, have previously been under District Court orders to desegregate their school system. Pursuant to said orders, all grades in the school systems will be fully desegregated in the 1967-1968 school year. Each student will have the opportunity to choose the school he wishes to attend. The respondents herein appealed to the United States Fifth Circuit alleging that the plans placed in operation by the District Courts were deficient in some respects.

2. On December 29, 1966, the United States Court of Appeals for the Fifth Circuit in a two to one decision, issued an opinion and a degree from which your petitioners applied for rehearing. A rehearing was granted and on March 10, 1967, the Court en banc heard oral argument thereon. On March 29, 1967, said Court of Appeals in an eight to four decision rendered an opinion adopting with clarifying statements the opinion

of December 29, 1966, and with minor changes the decree of December 29, 1966. The Court further stated that the mandate would issue immediately.

3. That your petitioners herein have filed a request with the Court of Appeals for the Fifth Circuit asking that the said mandate be recalled and/or stayed for a period of time sufficient to permit your petitioners to apply for certiorari to the United States Supreme Court. A copy of the two opinions rendered by the United States Court of Appeals for the Fifth Circuit, as well as the order denying the application for recall and/or stay of mandate, are attached hereto.

4. The jurisdiction of this Court to review the case on petition for certiorari rests upon 28 U.S.C. § 1254(1). Jurisdiction to issue the stay requested is granted by 28 U.S.C. § 2101(f).

5. *Reason for seeking certiorari.* In determining the appropriateness of a stay of a mandate pending certiorari proceedings in this Court, a Circuit Justice must inquire as to whether any of the matters proposed to be raised in the petition for certiorari are "sufficiently debatable to lead to the belief that at least four members of the Court would vote to grant certiorari" or some form of interim relief. *Edwards v. United States*, 76 S.Ct. 1058, 1 L.Ed. 2d 17. Petitioners submit that there are several major issues to be raised in the petition for certiorari which warrant a stay under this standard:

(a) In order to properly present the condition under which this application is made it must be noted

that even if the stay is granted, all grades in each of the respective school systems will be completely desegregated in the 1967-1968 school year. Petitioners are not proporting to oppose the question of desegregation as announced in *Brown vs. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 9 L.Ed. 873 and 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, nor is the question of deliberate speed at issue herein. *Board of School Commissioners of Mobile County v. Davis*, 375 U.S. 41, 85 S.Ct. 10.

(b) The decision below conflicts in many instances with previous decisions of this Court.

(1) The decree issued by the Court seeks by its very nature to require circuit wide conformity rather than allowing district courts to exercise the discretion as set forth in *Brown v. Board of Education*, 349 U. S. 483, 75 S.Ct. 753.

(2) The opinion of the Court placing on the school officials the affirmative duty of overcoming voluntary racial inbalance imposes an obligation foreign to previous decisions of this Court. *Brown v. Board of Eucation* 347 U. S. 483, 74 S. Ct. 686; 349 U.S. 294, 75 S. Ct. 753; *Cooper v. Aaron*, 358 U. S. 1, 78 S.Ct. 1401; *Goss v. Board of Education of City of Knoxville*, 373 U. S. 683, 83 S.Ct. 1405.

(3) The opinion of the Court raises a presumption that basic Constitutional issues may be sectionalized rather than applying uniformly as "the fundamental and paramount law of the nation". *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60; *Cooper v. Aaron*, supra. Constitu-

tional rights must not apply differently merely by virtue of the Circuit in which one resides.

(4) The opinion holding that a freedom of choice plan is constitutional only so long as it results in appreciable racial balancing is contrary to the opinion of this Court in *Goss v. Board of Education of City of Knoxville*, 373 U.S. 683, 687; 83 S.Ct. 1405, 1408.

(5) Despite the fact that no evidence whatsoever was taken in the District Courts concerning faculty and staff desegregation, the opinion requires not only faculty desegregation, but racial balancing. Such a pronouncement without an evidentary hearing runs contrary to previous decisions of this Court. *Bradley v. School Board of Richmond*, 382 U.S. 103, 15 L.Ed.2d 187, *Rogers v. Paul*, 382 U.S. 198, 15 L.Ed.2d 265.

(6) The opinion below approves the validity of the H.E.W. Guidelines and proclaims them as minimal constitutional standards, all of this despite the fact that the issue was not before the court. This gratuitous grant of legal status runs contrary to decisions of this Court. *United States v. Petrillo*, 322 U.S. 1, (1947); *United States v. International Union*, 352 U.S. 567, 590, (1957).

(7) The adoption of H.E.W. Guidelines constitutes a virtual abdication of judicial responsibility in permitting the executive branch of government to set minimal constitutional standards. This not only violates the doctrine of separation of

powers but places the administration of each school on a "Procrustean Couch" tailoring it to, not judicially established constitutional limits, but merely administrative dictates.

(c) The need for uniformity between Circuits speaks eloquently of the necessity for a review of the opinion below. Numerous decisions of other Circuits have found no constitutional impediment to voluntary racial imbalance or even involuntary racial imbalance innocently conceived. *Springfield School Comm. v. Barksdale*, 348 F.2d 261 (First Cir., 1965); *Evans v. Ennis*, 281 F.2d 385 (Third Cir., 1960); *Bradley v. School Board of City of Richmond*, 345 F.2d 310 (Fourth Cir., 1965) reversed on other grounds 382 U.S. 103, 15 L.Ed. 2d 187, 86 S.Ct. 224; *Deal v. Cincinnati Board of Education*, 369 F.2d 55 (Sixth Cir., 1963); *Bell v. School City of Gary, Indiana*, 324 F.2d 209 (Seventh Cir., 1963) cert. denied 377 U.S. 924, 12 L.Ed.2d 216, 84 S.Ct. 1733; *Clark v. Board of Education of Little Rock*, 369 F.2d 661 (Eighth Cir., 1966) rehearing denied March 31, 1967; *Downs v. Board of Education of Kansas City*, 336 F.2d 988, (Tenth Cir., 1964) cert. denied 380 U.S. 914.

6. Irreparable injury to your petitioners. The opinions as implemented presently and prospectively by the decree effectively remove the direction, if not the administration of school affairs, from the hands of local officials. Various portions of the decree, unless stayed pending a decision on writs, will cause immediate and irreparable injury. Illustrative of said injury are the following:

(a) Choice periods are fixed arbitrarily, even though in some circumstances the choice has already been exercised and school will not be opened during the entire period. (Decree II, (c))

(b) First class mailing of choice forms places a severe financial burden on the school board despite the fact that other less expensive means are adequate (Decree II, (f))

(c) Elimination of preference for prior attendance will require students to involuntarily engage in a game of musical chairs in order to obtain an education, when applied along with an annual choice plan (Decree II, (1))

(d) The decree determines to a large extent where public funds shall be spent and in some cases what courses shall be taught and to whom they should be taught. (Decree VI, (a)&(b))

(e) Under the decree, schools must be closed under certain circumstances; thus, in effect, expropriating property belonging to the local school boards. (Decree VI, (a))

(f) Proposed schools must be located with the object of elimination of racial imbalance rather than by need, availability, cost of land, student density or other rational educational reasons. Under the present circumstances school boards are in a quandary as to proposed construction and the school systems under these circumstances are suffering (Decree VII)

(g) Contracts for teachers must be voided, if

necessary, in order to achieve a semblance of racial balance of the faculty and staff of the respective school systems (Decree VIII, (a))

It is easy to see that the decree if enforceable immediately would create grat chaos in an area which raises many pertinent constitutional questions. A denial of the stay order will irreparably and immediately injure your petitioners. In addition thereto, District Courts in the State of Louisiana are already applying this decree to other school boards not parties to this action. Accordingly, most of the school boards in the State will be required to comply with this decree before this Honorable Court can determine the constitutional issues raised herein.

WHEREFORE, your petitioners pray that the judgment and mandate of the Court of Appeals for the Fifth Circuit, issued on the 29th day of March, 1967, be stayed and/or suspended pending the timely filing of a petition for writ of certiorari and final determination of the matter by this Court.

Respectfully submitted,

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CERTIFICATE

I, William P. Schuler, a member of the Bar of the United States Supreme Court, do hereby certify that copies of the foregoing application have been served on counsel for respondents by placing same in the United States mail at the following addresses with sufficient postage thereto annexed.

VIA AIR MAIL
Hon. John Doar
Assistant Attorney General
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Washington, D. C. 20530

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Mr. Alvin J. Bronstein
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Mr. A. P. Tureaud
1821 Orleans Avenue
New Orleans, Louisiana

New Orleans, Louisiana, this 11th day of April, 1967.

WILLIAM P. SCHULER

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23345

UNITED STATES OF AMERICA and LINDA STOUT, by her father and next friend, BLEVIN STOUT,

Appellants,

versus

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL,

Appellees.

No. 23331

UNITED STATES OF AMERICA,

Appellant,

versus

THE BOARD OF EDUCATION OF THE CITY OF FAIRFIELD, ET AL,

Appellees.

No. 23335

UNITED STATES OF AMERICA,

Appellant,

versus

THE BOARD OF EDUCATION OF THE CITY OF BESSEMER, ET AL.,

Appellees.

Appeals from the United States District Court for the Northern District of Alabama.

No. 23274

UNITED STATES OF AMERICA,
Appellant,

versus

CADDO PARISH SCHOOL BOARD, ET AL.,
Appellees.

No. 23365

UNITED STATES OF AMERICA,
Appellant,

versus

THE BOSSIER PARISH SCHOOL BOARD, ET AL.,
Appellees.

No. 23173

MARGARET M. JOHNSON, ET AL.,
Appellants,

versus

JACKSON PARISH SCHOOL BOARD, ET AL.,
Appellees.

No. 23192

YVORNIA DECAROL BANKS, ET AL.,
Appellants,

versus

CLAIBORNE PARISH SCHOOL BOARD, ET AL.,
Appellees.

No. 23253

JIMMY ANDREWS, ET AL.,
Appellant,

versus

CITY OF MONROE, LOUISIANA, ET AL.,
Appellees.

Appeals from the United States District Court for the Western District of Louisiana.

No. 23116

CLIFFORD EUGENE DAVIS, JR., ET AL.,
Appellants,

versus

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL.,
Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

ON PETITIONS FOR REHEARING EN BANC

(March 29, 1967.)

Before TUTTLE, Chief Judge, BROWN, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, and SIMPSON, Circuit Judges.

PER CURIAM: 1. The Court sitting en banc adopts the opinion and decree filed in these cases December 29, 1966, subject to the clarifying statements in this opinion and the changes in the decree attached to this opinion.

2. School desegregation cases involve more than a dispute between certain Negro children and certain

schools. If Negroes are ever to enter the mainstream of American life, as school children they must have equal educational opportunities with white children.

3. The Court holds that boards and officials administering public schools in this circuit[1] have the affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system in which there are no Negro schools and no white schools—just schools. Expressions in our earlier opinions distinguishing between integration and desegregation[2] must yield to this affirmative duty we now recognize. In fulfilling this duty it is not enough for school authorities to offer Negro children the opportunity to attend formerly all-white schools. The necessity of overcoming the effects of the dual school system in this circuit requires integration of faculties,

[1] "In the South", as the Civil Rights Commission has pointed out, the Negro "has struggled to get into the neighborhood school. In the North, he is fighting to get out of it." Civ. Rts. Comm. Rep., Freedom to the Free. 207 (1963).

This Court did not "excuse" neighborhood schools in the North and West which have de facto segregation. No case involving that sort of school system was before the Court.

School segregation is "inherently unequal" by any name and wherever located. But de facto segregation resulting from residential patterns in a non-racially motivated neighborhood school system has problems peculiar to such a system. The school system is already a unitary one. The difficulties lie in finding state action and in determining how far school officials must go and how far they may go in correcting racial imbalance. In such cases *Shelley v. Kraemer*, 334 U.S. 1 (1948) may turn out to be as important as *Brown*. A broad-brush doctrinaire approach, therefore, that *Brown*'s abolition of the dual school system solves all problems is conceptually and pragmatically inadequate for dealing with de facto-segregated neighborhood schools.

We leave the problems of de facto segregation in a unitary system to solution in appropriate cases by the appropriate courts.

[2] This distinction was first expressed in Briggs v. Elliott, E.D.S.C. 1955, 132 F. Supp. 776: "The Constitution, in other words, does not require integration. It merely forbids discrimination."

facilities, and activities, as well as students. To the extent that earlier decisions of this Court (more in the language of the opinion than in the effect of the holding) conflict with this view, the decisions are overruled. We refer specifically to the cases listed in footnote 2 of this opinion.[3]

4. Freedom of choice is not a goal in itself. It is a means to an end. A schoolchild has no inalienable right to choose his school. A freedom of choice plan is but one of the tools available to school officials *at this stage* of the process of converting the dual system of separate schools for Negroes and whites into a unitary system. The governmental objective of this conversion is—educational opportunities on equal terms to all. The criterion for determining the validity of a provision in a school desegregation plan is whether the provision is reasonably related to accomplishing this objective.

5. The percentages referred to in the Guidelines and in this Court's decree are simply a rough rule of thumb for measuring the effectiveness of freedom of choice as a useful tool. The percentages are not a method for setting quotas or striking a balance. If the plan is ineffective, longer on promises than performance, the school officials charged with initiating and

[3] Avery v. Wichita Falls Independent School District, 1956, 241 F.2d 230; Borders v. Rippy, 1957, 247 F.2d 268; Rippy v. Borders, 1957, 257 F.2d 73; Cohen v. Public Housing Administration, 1958, 257 F.2d 73; City of Montgomery v. Gilmore, 1960, 277 F.2d 364; Boson v. Rippy, 1960, 285 F.2d 43; Stell v. Savannah-Chatham County Board of Education, 1964, 333 F.2d 55; Evers v. Jackson, 1964, 328 F.2d 408; Lockett v. Board of Education of Muscogee County, 1965, 342 F.2d 225.

administering a unitary system have not met the constitutional requirements of the Fourteenth Amendment; they should try other tools.

6. In constructing the original and revised decrees, the Court gave great weight to the 1965 and 1966 HEW Guidelines. These Guidelines establish minimum standards clearly applicable to disestablishing state-sanctioned segregation. These Guidelines and our decree are within the decisions of this Court, comply with the letter and spirit of the Civil Rights Act of 1964, and meet the requirements of the United States Constitution. Courts in this circuit should give great weight to future HEW Guidelines, when such guidelines are applicable to this circuit and are within lawful limits. We express no opinion as to the applicability of HEW Guidelines in racially imbalanced situations such as occur in some other circuits where it is contended that state action may be found in state tolerance of de facto segregation or in such action as the drawing of attendance boundaries based on a neighborhood school system.

The Court reaffirms the reversal of the judgments below and the remand of each case for entry of the decree attached to this opinion.

The mandate will issue immediately.

CORRECTED DECREE.

It is ORDERED, ADJUDGED and DECREED that the defendants, their agents, officers, employees and successors and all those in active concert and participation with them, be and they are permanently enjoined from discriminating on the basis of race or color in the operation of the school system. As set out more particularly in the body of the decree, they shall take affirmative action to disestablish all school segregation and to eliminate the effects of the dual school system:

I.

SPEED OF DESEGREGATION

Commencing with the 1967-68 school year, in accordance with this decree, all grades, including kindergarten grades, shall be desegregated and pupils assigned to schools in these grades without regard to race or color.

II.

EXERCISE OF CHOICE

The following provisions shall apply to all grades:

(a) *Who May Exercise Choice.* A choice of schools may be exercised by a parent or other adult person serving as the student's parent. A student may exercise his own choice if he (1) is exercising a choice

for the ninth or a higher grade, or (2) has reached the age of fifteen at the time of the exercise of choice. Such a choice by a student is controlling unless a different choice is exercised for him by his parent or other adult person serving as his parent during the choice period or at such later time as the student exercises a choice. Each reference in this decree to a student's exercising a choice means the exercise of the choice, as appropriate, by a parent or such other adult, or by the student himself.

(b) *Annual Exercise of Choice.* All students, both white and Negro, shall be required to exercise a free choice of schools annually.

(c) *Choice Period.* The period for exercising choice shall commence May 1, 1967 and end June 1, 1967, and in subsequent years shall commence March 1 and end March 31 preceding the school year for which the choice is to be exercised. No student or prospective student who exercises his choice within the choice period shall be given any preference because of the time within the period when such choice was exercised.

(d) *Mandatory Exercise of Choice.* A failure to exercise a choice within the choice period shall not preclude any student from exercising a choice at any time before he commences school for the year with respect to which the choice applies, but such choice may be subordinated to the choices of students who exercised choice before the expiration of the choice

period. Any student who has not exercised his choice of school within a week after school opens shall be assigned to the school nearest his home where space is available under standards for determining available space which shall be applied uniformly throughout the system.

(e) *Public Notice.* On or within a week before the date the choice period opens, the defendants shall arrange for the conspicuous publication of a notice describing the provisions of this decree in the newspaper most generally circulated in the community. The text of the notice shall be substantially similar to the text of the explanatory letter sent home to parents. Publication as a legal notice will not be sufficient. Copies of this notice must also be given at that time to all radio and television stations located in the community. Copies of this decree shall be posted in each school in the school system and at the office of the Superintendent of Education.

(f) *Mailing of Explanatory Letters and Choice Forms.* On the first day of the choice period there shall be distributed by first-class mail an explanatory letter and a choice form to the parent (or other adult person acting as parent, if known to the defendants) of each student, together with a return envelope addressed to the Superintendent. Should the defendants satisfactorily demonstrate to the court that they are unable to comply with the requirement of distributing the explanatory letter and choice form by first-class

mail, they shall propose an alternative method which will maximize individual notice, i.e., personal notice to parents by delivery to the pupil with adequate procedures to insure the delivery of the notice. The text for the explanatory letter and choice form shall essentially conform to the sample letter and choice form appended to this decree.

(g) *Extra Copies of the Explanatory Letter and Choice Form.* Extra copies of the explanatory letter and choice form shall be freely available to parents, students, prospective students, and the general public at each school in the system and at the office of the Superintendent of Education during the times of the year when such schools are usually open.

(h) *Content of Choice Form.* Each choice form shall set forth the name and location and the grades offered at each school and may require of the person exercising the choice the name, address, age of student, school and grade currently or most recently attended by the student, the school chosen, the signature of *one* parent or other adult person serving as parent, or where appropriate the signature of the student, and the identity of the person signing. No statement of reasons for a particular choice, or any other information, or any witness or other authentication, may be required or requested, without approval of the court.

(i) *Return of Choice Form.* At the option of the person completing the choice form, the choice may

be returned by mail, in person, or by messenger to any school in the school system or to the office of the Superintendent.

(j) *Choices not on Official Form.* The exercise of choice may also be made by the submission in like manner of any other writing which contains information sufficient to identify the student and indicates that he has made a choice of school.

(k) *Choice Forms Binding.* When a choice form has once been submitted and the choice period has expired, the choice is binding for the entire school year and may not be changed except in cases of parents making different choices from their children under the conditions set forth in paragraph II (a) of this decree and in exceptional cases where, absent the consideration of race, a change is educationally called for or where compelling hardship is shown by the student. A change in family residence from one neighborhood to another shall be considered an exceptional case for purposes of this paragraph.

(l) *Preference in Assignment.* In assigning students to schools, no preferences shall be given to any student for prior attendance at a school and, except with the approval of court in extraordinary circumstances, no choice shall be denied for any reason other than overcrowding. In case of overcrowding at any school, preference shall be given on the basis of the proximity of the school to the homes of the students choosing it, without regard to race or color. Standards

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for determining overcrowding shall be applied uniformly throughout the system.

(m) *Second Choice where First Choice is Denied.* Any student whose choice is denied must be promptly notified in writing and given his choice of any school in the school system serving his grade level where space is available. The student shall have seven days from the receipt of notice of a denial of first choice in which to exercise a second choice.

(n) *Transportation.* Where transportation is generally provided, buses must be routed to the maximum extent feasible in light of the geographic distribution of students, so as to serve each student choosing any school in the system. Every student choosing either the formerly white or the formerly Negro school nearest his residence must be transported to the school to which he is assigned under these provisions, whether or not it is his first choice, if that school is sufficiently distant from his home to make him eligible for transportation under generally applicable transportation rules.

(o) *Officials not to Influence Choice.* At no time shall any official, teacher, or employee of the school system influence any parent, or other adult person serving as a parent, or any student, in the exercise of a choice or favor or penalize any person because of a choice made. If the defendant school board employs professional guidance counselors, such persons shall base their guidance and counselling on the individual student's particular personal, academic,

and vocational needs. Such guidance and counselling by teachers as well as professional guidance counsellors shall be available to all students without regard to race or color.

(p) *Protection of Persons Exercising Choice.* Within their authority school officials are responsible for the protection of persons exercising rights under or otherwise affected by this decree. They shall, without delay, take appropriate action with regard to any student or staff member who interferes with the successful operation of the plan. Such interference shall include harassment, intimidation, threats, hostile words or acts, and similar behavior. The school board shall not publish, allow, or cause to be published, the names or addresses of pupils exercising rights or otherwise affected by this decree. If officials of the school system are not able to provide sufficient protection, they shall seek whatever assistance is necessary from other appropriate officials.

III.

PROSPECTIVE STUDENTS

Each prospective new student shall be required to exercise a choice of schools before or at the time of enrollment. All such students known to defendants shall be furnished a copy of the prescribed letter to parents, and choice form, by mail or in person, on the date the choice period opens or as soon thereafter as the school system learns that he plans to enroll.

Where there is no pre-registration procedure for newly entering students, copies of the choice forms shall be available at the Office of the Superintendent and at each school during the time the school is usually open.

IV.

TRANSFERS

(a) *Transfers for Students.* Any student shall have the right at the beginning of a new term, to transfer to any school from which he was excluded or would otherwise be excluded on account of his race or color.

(b) *Transfers for Special Needs.* Any student who requires a course of study not offered at the school to which he has been assigned may be permitted, upon his written application, at the beginning of any school term or semester, to transfer to another school which offers courses for his special needs.

(c) *Transfers to Special Classes or Schools.* If the defendants operate and maintain special classes or schools for physically handicapped, mentally retarded, or gifted children, the defendants may assign children to such schools or classes on a basis related to the function of the special class or school that is other than freedom of choice. In no event shall such assignments be made on the basis of race or color or in a manner which tends to perpetuate a dual school system based on race or color.

V.

SERVICES, FACILITIES, ACTIVITIES AND PROGRAMS

No student shall be segregated or discriminated against on account of race or color in any service, facility, activity, or program (including transportation, athletics, or other extracurricular activity) that may be conducted or sponsored by the school in which he is enrolled. A student attending school for the first time on a desegregated basis may not be subject to any disqualification or waiting period for participation in activities and programs, including athletics, which might otherwise apply because he is a transfer or newly assigned student except that such transferees shall be subject to longstanding, non-racially based rules of city, county, or state athletic associations dealing with the eligibility of transfer students for athletic contests. All school use or school-sponsored use of athletic fields, meeting rooms, and all other school related services, facilities, activities, and programs such as commencement exercises and parent-teacher meetings which are open to persons other than enrolled students, shall be open to all persons without regard to race or color. All special educational programs conducted by the defendants shall be conducted without regard to race or color.

VI.

SCHOOL EQUALIZATION

(a) *Inferior Schools.* In schools heretofore maintained for Negro students, the defendants shall take prompt steps necessary to provide physical facilities, equipment, courses of instruction, and instructional materials of quality equal to that provided in schools previously maintained for white students. Conditions of overcrowding, as determined by pupil-teacher ratios and pupil-classroom ratios shall, to the extent feasible, be distributed evenly between schools formerly maintained for Negro students and those formerly maintained for white students. If for any reason it is not feasible to improve sufficiently any school formerly maintained for Negro students, where such improvement would otherwise be required by this paragraph, such school shall be closed as soon as possible, and students enrolled in the school shall be reassigned on the basis of freedom of choice. By October of each year, defendants shall report to the Clerk of the Court pupil-teacher ratios, pupil-classroom ratios, and per-pupil expenditures both as to operating and capital improvement costs, and shall outline the steps to be taken and the time within which they shall accomplish the equalization of such schools.

(b) *Remedial Programs.* The defendants shall provide remedial education programs which permit students attending or who have previously attended seg-

regated schools to overcome past inadequacies in their education.

VII.

NEW CONSTRUCTION

The defendants, to the extent consistent with the proper operation of the school system as a whole, shall locate any new school and substantially expand any existing schools with the objective of eradicating the vestiges of the dual system.

VIII.

FACULTY AND STAFF

(a) *Faculty Employment.* Race or color shall not be a factor in the hiring, assignment, reassignment, promotion, demotion, or dismissal of teachers and other professional staff members, including student teachers, except that race may be taken into account for the purpose of counteracting or correcting the effect of the segregated assignment of faculty and staff in the dual system. Teachers, principals, and staff members shall be assigned to schools so that the faculty and staff is not composed exclusively of members of one race. Wherever possible, teachers shall be assigned so that more than one teacher of the minority race (white or Negro) shall be on a desegregated faculty. Defendants shall take positive and affirmative steps to accomplish the desegregation of their school faculties and to achieve substantial de-

segregation of faculties in as many of the schools as possible for the 1967-68 school year notwithstanding that teacher contracts for the 1967-68 or 1968-69 school years may have already been signed and approved. The tenure of teachers in the system shall not be used as an excuse for failure to comply with this provision. The defendants shall establish as an objective that the pattern of teacher assignment to any particular school not be identifiable as tailored for a heavy concentration of either Negro or white pupils in the school.

(b) *Dismissals.* Teachers and other professional staff members may not be discriminatorily assigned, dismissed, demoted, or passed over for retention, promotion, or rehiring, on the ground of race or color. In any instance where one or more teachers or other professional staff members are to be displaced as a result of desegregation, no staff vacancy in the school system shall be filled through recruitment from outside the system unless no such displaced staff member is qualified to fill the vacancy. If, as a result of desegregation, there is to be a reduction in the total professional staff of the school system, the qualifications of all staff members in the system shall be evaluated in selecting the staff member to be released without consideration of race or color. A report containing any such proposed dismissals, and the reasons therefor, shall be filed with the Clerk of the Court, serving copies upon opposing counsel, within five (5) days after such dismissal, demotion, etc., as proposed.

(c) *Past Assignments.* The defendants shall take steps to assign and reassign teachers and other professional staff members to eliminate the effects of the dual school system.

IX.

REPORTS TO THE COURT

(1) *Report on Choice Period.* The defendants shall serve upon the opposing parties and file with the Clerk of the Court on or before April 15, 1967, and on or before June 15, 1967, and in each subsequent year on or before June 1, a report tabulating by race the number of choice applications and transfer applications received for enrollment in each grade in each school in the system, and the number of choices and transfers granted and the number of denials in each grade of each school. The report shall also state any reasons relied upon in denying choice and shall tabulate, by school and by race of student, the number of choices and transfers denied for each such reason.

In addition, the report shall show the percentage of pupils actually transferred or assigned from segregated grades or to schools attended predominantly by pupils of a race other than the race of the applicant, for attendance during the 1966-67 school year, with comparable data for the 1965-66 school year. Such additional information shall be included in the report served upon opposing counsel and filed with the Clerk of the Court.

(2) *Report After School Opening.* The defendants shall, in addition to reports elsewhere described, serve upon opposing counsel and file with the Clerk of the Court within 15 days after the opening of schools for the fall semester of each year, a report setting forth the following information:

(i) The name, address, grade, school of choice and school of present attendance of each student who has withdrawn or requested withdrawal of his choice of school or who has transferred after the start of the school year, together with a description of any action taken by the defendants on his request and the reasons therefor.

(ii) The number of faculty vacancies, by school, that have occurred or been filled by the defendants since the order of this Court or the latest report submitted pursuant to this sub-paragraph. This report shall state the race of the teacher employed to fill each such vacancy and indicate whether such teacher is newly employed or was transferred from within the system. The tabulation of the number of transfers within the system shall indicate the schools from which and to which the transfers were made. The report shall also set forth the number of faculty members of each race assigned to each school for the current year.

(iii) The number of students by race, in each grade of each school.

EXPLANATORY LETTER

(School System Name and Office Address)

(Date Sent)

Dear Parent:

All grades in our school system will be desegregated next year. Any student who will be entering one of these grades next year may choose to attend any school in our system, regardless of whether that school was formerly all-white or all-Negro. It does not matter which school your child is attending this year. You and your child may select any school you wish.

Every student, white and Negro, must make a choice of schools. If a child is entering the ninth or higher grade, or if the child is fifteen years old or older, he may make the choice himself. Otherwise a parent or other adult serving as parent must sign the choice form. A child enrolling in the school system for the first time must make a choice of schools before or at the time of his enrollment.

The form on which the choice should be made is attached to this letter. It should be completed and returned by June 1, 1967. You may mail it in the enclosed envelope, or deliver it by messenger or by hand to any school principal or to the Office of the Superintendent at any time between May 1 and June 1. No one may require you to return your choice form before June 1 and no preference is given for returning the choice form early.

No principal, teacher or other school official is permitted to influence anyone in making a choice or to require early return of the choice form. No one is permitted to favor or penalize any student or other person because of a choice made. A choice once made cannot be changed except for serious hardship.

No child will be denied his choice unless for reasons of overcrowding at the school chosen, in which case children living nearest the school will have preference.

Transportation will be provided, if reasonably possible, no matter what school is chosen. [Delete if the school system does not provide transportation.]

Your School Board and the school staff will do everything we can to see to it that the rights of all students are protected and that desegregation of our schools is carried out successfully.

Sincerely yours,

Superintendent.

CHOICE FORM

This form is provided for you to choose a school for your child to attend next year. You have 30 days to make your choice. It does not matter which school your child attended last year, and does not matter whether the school you choose was formerly a white or Negro school. This form must be mailed or brought

to the principal of any school in the system or to the office of the Superintendent, [address], by June 1, 1967. A choice is required for each child.

Name of child .....
(Last) (First) (Middle)

Address .....

Name of Parent or other
adult serving as parent .....

If child is entering first grade, date of birth:
.....
(Month) (Day) (Year)

Grade child is entering .....

School attended last year .....

Choose one of the following schools by marking an X beside the name.

Name of School	Grade	Location
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....

Signature .....

Date .....

.....

.....

To be filled in by Superintendent:

School Assigned .....[1]

[1] In subsequent years the dates in both the explanatory letter and the choice form should be changed to conform to the choice period.

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GEWIN, Circuit Judge, with whom Judge Bell concurs, DISSENTING:

The opinion of the majority and the proposed decree are long, complicated, somewhat ambiguous and rather confusing. The per curiam opinion of the majority of the en banc court does not substantially clarify, modify or change anything said in the original opinion filed December 29, 1966. Only minor and inconsequential changes were made in the proposed decree.[1] In my view both the opinion and decree constitute an abrupt and unauthorized departure from the mainstream of judicial thought both of this Circuit and a number of other Circuits. I am unable to agree either with the opinion or the decree, especially those provisions dealing with the following: (1) de facto and de jure segregation; (2) the guidelines; (3) the proposed decree; (4) attendance percentages, proportions, and freedom of choice; and (5) enforced integration.

I

De Facto and De-jure Segregation

The thesis of the majority, like Minerva (Athena) of the classic myths,[2] was spawned full-grown and

[1] "The opinion" and "the decree" as used herein refer to the opinion and decree filed in these cases by the three judge panel on December 29, 1966, wherein two of the judges agreed and one dissented. Of necessity, references to page numbers of the opinion refer to the slip opinion.

[2] See Gayley, The Classic Myths, (Rev. ed. 1939) page 23 "She sprang from the brain of Jove, agleam with panoply of war, brandishing a spear and with her battle-cry awakening the echoes of heaven and earth."

full-armed. It has no substantial legal ancestors.[3] We must wait to see what progeny it will produce.

While professing to fashion a remedy under the benevolent canopy of the Federal Constitution, the opinion and the decree are couched in divisive terms and proceed to dichotomize the union of states into two separate and distinct parts. Based on such reasoning the Civil Rights Act of 1964 is stripped of its national character, the national policies therein stated are nullified, and in effect, the remedial purposes of the Act are held to apply to approximately one-third of the states of the union and to a much smaller percentage or proportion of the total population of the country. I am unable to believe that the Congress had any such intent. If it did, a serious constitutional question would be presented as to the validity of the entire Act under our concepts of American constitutional government.

The Negro children in Cleveland, Chicago, Los Angeles, Boston, New York, or in any other area of the nation which the opinion classifies under de facto segregation, would receive little comfort from the assertion that the racial make-up of their school system does not violate their constitutional rights because

[3] However, compare the doctrine of the majority and the theme of an article in the Virginia Law Review entitled "Title VI, The Guidelines and School Desegregation in the South", by James R. Dunn. Virginia Law Review, Vol. 53, page 42 (1967). According to footnote 85 of the law review article, the majority opinion was released "as this article was going to press." Mr. Dunn is Legal Adviser, Equal Educational Opportunities Program, United States Office of Education, HEW, Washington, D.C.

they were born into a de facto society, while the exact same racial make-up of the school system in the 17 Southern and border states violates the constitutional rights of their counterparts, or even their blood brothers, because they were born into a de jure society. All children everywhere in the nation are protected by the Constitution, and treatment which violates their constitutional rights in one area of the country, also violates such constitutional rights in another area. The details of the remedy to be applied, however, may vary with local conditions. Basically, all of them must be given the same constitutional protection. Due process and equal protection will not tolerate a lower standard, and surely not a double standard. The problem is a national one.

Regardless of our decrees, in spite of our hopes and notwithstanding our disappointments, there is no infallible and certain process of alchemy which will erase decades of history and transmute a distasteful set of circumstances into a utopia of perfection. All who have studied the subject recognize that discriminatory practices did not arise from a single cause. Such practices had their origin and birth in social, economic, educational, legal, geographical and numerous other considerations. These factors tend to be self-perpetuating. We must eradicate them, and I have the faith that they will be eradicated and eliminated by responsible and responsive governmental agencies acting pursuant to the best interests of the community. There is no social antibiotic which will

effect a sudden or overnight cure. It is not possible to specifically fix the blame or to attribute the origin of discriminatory practices to isolated causes, and it is surely inappropriate to undertake to fasten guilt upon any segment of the population. In this area of our nation's history eminent historians still disagree as to causes and effects. Some studies have placed emphasis on the slave trader or the importer of slaves, others have blamed the slave holder, while others have tried to trace the guilt back to tribal chieftans in Africa. Perhaps the most common understanding amongst all the historians and students of the problem is the conclusion that causes cannot be isolated and responsibility cannot be limited to a particular group. Whatever the cause or explanation, it is clear that the responsibility rests on many rather than few.

At this time, almost 13 years after the decisions in *Brown v. Board of Education* (1954) 347 U.S. 483, 98 L.ed. 873 (*Brown I*) and *Brown v. Board of Education* (1955) 349 U.S. 294, 99 L.ed. 1083 (*Brown II*), there should be no doubt in the minds of anyone that compulsory segregation in the public school systems of this nation must be eliminated. Negro children have a personal, present, and unqualified constitutional right to attend the public schools on a racially nondiscriminatory basis.

Although espousing the cause of uniformity and asserting there must not be one law for Athens and another for Rome, the opinion does not follow that thesis or principle. One of the chief difficulties

which I encounter with the opinion is that it concludes that the Constitution means one thing in 17 states of the nation and something else in the remaining states. This is done by a rather ingenious though illogical distinction between the terms de facto segregation and de jure segregation. While the opinion recognizes the evils common to both types, it relies heavily on background facts to justify the conclusion that the evil will be corrected in one area of the nation and not in the other. In my view the Constitution cannot be bent and twisted in such a manner as to justify or support such an incongruous result. The very subject matter under consideration tends to nullify the assertion that the constitutional prohibition against segregation should be applied in 17 states and not in the rest of the nation.

Legislative history clearly supports the idea that no distinction should be made with respect to the various states in dealing with the problem. Senator Pastore was one of the principal spokesmen who handled this legislation. He gave the following explanation:

> "Frankly I do not see how we could have gone any further, to be fair . . . Section 602 of Title VI, not only requires the agency to promulgate rules and regulations, but all procedure must be in accord with these rules and regulations. They must have broad scope. They must be national. They must apply to all fifty states. We could not

draw one rule to apply to the State of Mississippi, another rule to apply to the State of Alabama, and another rule to apply to the State of Rhode Island. There must be only one rule, to apply to every state. Further, the President must approve the rule." (110 Cong. Rec. 7059, April 7, 1964)

* * *

"MR. PASTORE. . . . We must do what Title VI provides; and we could do it in no milder form than that now provided by Title VI. The Senator from Tennessee says, 'Let us read this title'. I say so, too. When we read these two pages, we understand that the whole philosophy of Title VI is to promote voluntary compliance. It is written right in the law. There shall be the voluntary compliance as the first step, and then the second step they must inaugurate and promulgate, rules that have a national effect, not a local effect. They shall apply to Tennessee, to Louisiana, to Rhode Island, in equal fashion." (110 Cong. Rec. 7066, April 7, 1964)

In connection with the distinction which the opinion undertakes to make, it is pertinent to observe the following strong and unequivocal pronouncement in the very beginning of the decision in *Brown II:*

"All provisions of *federal, state, or local* law requiring or permitting such discrimination must yield to this principle. There remains

> for consideration the manner in which relief is to be accorded." (Emphasis added) (page 298)

It should be observed that all public school segregation was de jure in the broad sense of that term prior to the first *Brown* decision, in that segregation was permitted, if not required, by law.

It is undoubtedly true that any problem which reaches national proportions is often generated by varying and different customs, mores, laws, habits and manners. Such differences in the causes which contributed to the creation and existence of the problem in the first instance, do not justify the application of a fundamental constitutional principle in one area of the nation and a failure to apply it in another.

While all the authorities recognize the existence and operation of different causes in the historical background of racial segregation, there are also marked similarities. This fact is noted in the recently released study by the United States Commission on Civil Rights, RACIAL ISOLATION IN THE SCHOOLS, 1967, Vol. I (pp. 39, 59-79). In discussing the subject the following observation is made early in the report:

> "Today it [racial isolation or segregation] is attributable to remnants of the dual school system, methods of student assignment, residential segregation, and to those discretion-

> ary decisions *familiar in the North*—site selection, school construction, transfers, and the determination of where to place students in the event of overcrowding." (Emphasis added)

In its summary the Commission notes that the causes of racial isolation or school segregation are complex and self-perpetuating. It speaks of the *Nation's* metropolitan areas and refers to social and economic factors as well as geographical ones. According to the summary, not only do *state* and *local* governments share the blame, it is categorically asserted that "The *Federal Government* also shares in this responsibility." (Emphasis added) Pertinent similarities in the problem, applicable to the entire nation, are forcefully asserted in the final sentence of the Commission's Summary:

> "*In the North,* where school segregation was not generally compelled by law, these [discriminatory] policies and practices have helped to increase racial separation. *In the South,* where until the Brown decision in 1954 school segregation was required by law, *similar policies and practices* have contributed to its perpetuation." (Emphasis added)

By a process of syllogistic reasoning based on fatally defective major premises the opinion has distorted the meaning of the term segregation and has segmented its meaning into de facto and de jure segregation. All segregation in the South is classified as

de jure[4] while segregation in the North is classified as de facto. Different rules apply to the different types of segregation. The South is heavily condemned. The opinion approaches the problem on a sectional basis and fails to consider the subject except on a sectional or regional basis. There are many references to "the eleven" Southern states and "the seven" border states. This area of the nation is variously characterized as "The eleven states of the Confederacy," "the entire region encompassing the southern and border states", "wearing the badge of slavery", and "arpartheid". Finally, the opinion concludes that the two types of segregation are different, have different origins, create different problems and require different corrective action. It is suggested that there is no present remedy for de facto segregation but that the problems and questions arising from de facto segregation may someday be answered by the Supreme Court.[5]

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[4] At one place in the opinion *pseudo* de facto segregation in the South is mentioned, but it is asserted that any similarity between pseudo de facto segregation in the South and actual de facto segregation in the North is more apparent than real. (p. 68)

[5] The case of Blocker v. Bd. of Educ. of Manhasset, N.Y. (E.D. N.Y. 1964) 226 F. Supp. 208 cited and relied on by the majority does not support the de facto-de jure distinction. In fact Judge Zavatt disavows any such distinction. The following is from the opinion:

> "On the facts of this case, the separation of the Negro elementary school children is segregation. It is segregation by law—the law of the School Board. In the light of the existing facts, the continuance of the defendant Board's impenetrable attendance lines amounts to nothing less than state imposed segregation."
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> "This segregation is attributable to the State. The prohibitions of the Fourteenth Amendment 'have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that ac-

This Court, and the district courts within the six states embraced within our jurisdiction like many other federal courts of the nation have given much time and attention to the solution of the problems arising after the *Brown* decisions. Much has been accomplished, much remains to be done. It is not possible for me to join in the expressions of pessimism contained in the opinion or to approve the insinuations that the courts have failed in the performance of their duty.[6] Even Congress is taken to task for failure to act earlier and for failure to recognize

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tion may be taken. * * *Whoever, by virtue of public position under a State government, * * * takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.' Ex Parte Virginia, 100 U.S. 339, 346-347, 25 L.Ed. 676,679 (1880). 'The situation here is in no different posture because the members of the School Board and the Superintendent of Schools are local officials; from the point of view of the Fourteenth Amendment, they stand in this litigation as the agents of the State.' Cooper v. Aaron, supra, 358 U.S. at 16, 78 S.Ct. at 1408, 3 L.ed.2d 5."

[6] See for example the following statements from the opinion:

"The courts acting alone have failed." (p. 7).

* * *

"Quantatively, the results were meager." (p. 20-21)

* * *

"And most judges do not have sufficient competence—they are not educators or school administrators—to know the right questions, much less the right answers." (p. 24)

* * *

"In some cases there has been a substantial time-lag between this Court's opinions and their application by the district courts. In certain cases—which we consider unnecessary to cite—there has even been a manifest variance between this Court's decision and a later district court decision. A number of district courts still mistakenly assume that transfers under Pupil Placement Laws—superimposed on unconstitutional initial assignment—satisfy the requirements of a desegregation plan." (p. 36)

school desegregation "as the law of the land."[7] In the *Brown* cases the Court clearly and wisely recognized the fact that those decisions had changed the law which had been in effect for decades. Due notice was taken of the fact that the new order of the day would "involve a variety of local problems." The court recognized "the complexities arising from the transition to a system of public education freed of racial discrimination." Moreover, the Court stated, "Full implementation of these constitutional principles may require solution of varied local school problems." The courts were instructed to be "guided by equitable principles," to give consideration to "practical flexibility in shaping remedies" and observed that equity courts have a peculiar "facility for adjusting and reconciling public and private needs." The *Brown* decisions emphasized the concept that courts of equity are particularly qualified to shape such remedies as would "call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles" pronounced in the first *Brown* decision. Contrary to the tone and expressions of the majority opinion, the Supreme Court early announced the policy of heavy reliance on the district courts and that policy has continued to this date.

[7] See item (5), page 24 of the opinion:
"(5) But one reason more than any other has held back desegregation of public schools on a large scale. This has been the lack, until 1964, of effective congressional statutory recognition of school desegregation as the law of the land."

II

Guidelines

With respect to the guidelines, it should be noted that they were not an issue presented to the District Court. The cases here involved had been tried in the respective district courts, appeals taken to this Court and were pending on the docket of this Court before the 1966 Guidelines were promulgated. Guidelines were not made an issue by the pleadings or otherwise in the district courts and no evidence was taken with respect to them. The issue of the guidelines are before this Court because the Court, sua sponte, brought the issue before it.[8] In my view their validity is not an issue to be decided in this Court. See *United States v. Petrillo* (1947) 332 U.S. 1,5,6; *United States v. International Union* (1957) 352 U.S. 567,590; *Connor v. New York Times* (5 Cir. 1962) 310 F.2d 133, 135; *Gibbs v. Blackwell* (5 Cir. 1965) 354 F.2d 469,471.

In its first approach to the question the Court indicated that it would not pass upon the constitutionality of the guidelines but would give weight to or rely upon them as a matter of judicial policy. When con-

[8] See opinion, page 10, footnote 13.
It should be noted that when the panel which originally heard this case invited briefs no mention was made of any constitutional question or issue with respect to the HEW guidelines. Rather, the questions posed related to whether it was "permissible and desirable" for the court to give weight to or rely on the guidelines; and if so, what practical means or methods should be employed in making use of the guidelines. From the questions raised by the court, counsel could not have gained the impression that the court was to make a full scale determination of the constitutional questions involved.

fronted with the fact that the guidelines were not approved by the President as required by the Civil Rights Act of 1964, the opinion then concluded that they do not constitute or purport to be rules or regulations or orders of general application. It was then stated that since they were not a rule, regulation or order, they constitute "a statement of policy", and while HEW "is under no statutory compulsion to issue such statements" it was decided that it is "of manifest advantage" to the general public to know the basic considerations which the Commissioner uses "in determining whether a school meets the requirements for eligibility to receive financial assistance." Immediately the opinion recognizes the inherent unfairness and vices of such pronouncements of administrative policy without an evidentiary hearing. "The guidelines have the vices of all administrative policies established unilaterally without a hearing."[9] Finally, the opinion concludes that the guidelines are fully constitutional, recognizing as it is bound to do, that a failure to comply with them cuts the purse strings and closes the treasury to all who fail to comply:

> "The great bulk of the school districts in this circuit have applied for federal financial assistance and therefore operate under voluntary desegregation plans. Approval of these plans by the Office of Education qualifies the schools for federal aid. *In this opinion we have held that the HEW Guidelines now in effect are constitutional and are within the statutory authority created in the Civil Rights*

[9] See opinion page 30.

> *Act of 1964.* Schools therefore, in compliance with the Guidelines can in general be regarded as discharging constitutional obligations." (Emphasis added) (p. 112)

Whether viewed from a substantive or procedural point of view, due process and sound judicial administration require, at the very least, an evidentiary hearing on a matter so vital to so many people.[10] Not only are numerous people affected, but those most affected are the school children of the nation. The most vital segment of our democratic society is our school system. The operation and administration of the public school systems of this nation are essentially a local business. It is unthinkable that matters that so vitally affect this phase of the national welfare should be decided in such summary fashion. In the

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[10] The 1966 Guidelines were promulgated on March 7, 1966, after these cases were docketed in this Court. The fact that the appellees had no opportunity to have a hearing and that the guidelines were unilaterally issued without receipt of evidence from the numerous school districts was called to the attention of this Court by one of the briefs for appellees:

> "As pointed out in detail below, the Constitutional and legislative principles applicable to the expenditures of federal funds, the legislative and administrative discretion placing conditions upon the receipt and use thereof, the lack of due process in the adoption thereof and the lack of any opportunity to be heard by those affected thereby all render such Guidelines inapplicable to the pending cases."
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> "The 1966 Guidelines (as well as the 1965 Guidelines) were not approved by the President. They were issued by the Office of Education unilaterally without an opportunity for the representatives of the thousands of school districts affected thereby to be heard. As unilateral directives they have not been subject to judicial review."

See consolidated brief Jefferson County Board of Education, pp. 76-77.

two most recent pronouncements by the Supreme Court dealing with the problem of segregation as related to faculty and staff, that Court refused to act without an evidentiary hearing. In both decisions the cases were remanded to the district court "for evidentiary hearings." *Bradley v. School Bd. of Richmond* (1965) 382 U.S. 103, 15 L.ed.2d 187; *Rogers v. Paul* (1965) 382 U.S. 198, 15 L.ed.2d 265. Similarly, in *Calhoun v. Latimer* (1964) 377 U.S. 263, 12 L.ed.2d 288, the Court had for consideration a desegregation plan of the Atlanta Board of Education. During the argument before the Supreme Court counsel for the Board of Education informed the Court that subsequent to the decision of the lower court, the Board had adopted additional provisions authorizing "free transfers with certain limitations in the city high schools". The petitioners contended that the changes did not meet constitutional standards and asserted that with respect to elementary students the changed plan would not achieve desegregation until sometime in the 1970's. The Supreme Court did not "grasp the nettle" but vacated the order of the lower court and remanded the case to "be appraised by the district court in a *proper evidentiary hearing.*" (Emphasis added)

III

Decree

I now come to a consideration of the decree ordered to be entered and its relation to the opinion. It is impossible to consider the decree and the opinion sep-

arately; they are inextricably interwoven. Neither takes into account "multifarious local difficulties", and therefore, any particular or peculiar local problems are submerged and sacrificed to the apparent determination, evident on the face of both the opinion and the decree, to achieve percentage enrollments which will reflect the kind of racial balance the opinion seeks to achieve.

The opinion asserts that uniformity must be achieved forthwith in everyone of the six states embraced within the Fifth Circuit. No consideration is given to any distinction in any of the numerous school systems involved. Urban schools, rural ones, small schools, large ones, areas where racial imbalance is large or small, the relative number of Negro and white children in any particular area, or any of the other myriad problems which are known to every school administrator, are taken into account. All things must yield to speed, uniformity, percentages and proportional representation. There are no limitations and there are no excuses. This philosophy does not comport with the philosophy which has guided and been inherent in the segregation problem since *Brown II*. As the Court there stated:

> "Because these cases arose under *different local conditions* and their disposition will involve a variety *of local problems*, we required further *argument* on the question of relief." (p. 298) (Emphasis added)

See also *Davis v. Bd. of Comm. of Mobile Co., Ala.*, 322 F.2d 356 (5 Cir. 1963) wherein this Court made a distinction in the rural and urban schools of Mobile County, Alabama. We held:

> "The District Court may modify this order to defer desegregation of rural schools in Mobile County until September 1964, should the District Court after further hearing conclude that special planning of administrative problems for rural schools in the county make it impracticable for such schools to start desegregation in September 1963."

The effectiveness of the district courts has been seriously impaired, in a real sense, contrary to the teachings of all the decisions of the Supreme Court since *Brown II*. Under the opinion and decree a United States District Judge serves essentially as a referee, master, or hearing examiner. Now his only functions are to order the enforcement of the detailed, uniform, stereotyped formal decree, to supervise compliance with its detailed provisions as therein ordered and directed, and to receive periodic reports much in the same fashion as reports are received by an ordinary clerk in a large business establishment.

Such a detailed decree on the appellate level not only violates sound concepts of judicial administration, but it violates a longstanding philosophy of the federal judicial system, and indeed all judicial systems common to this country, which vest wide dis-

cretion and authority in trial courts because of their closeness to and familiarity with local problems. See the opinions in *Brown II*, *Bradley*, *Rogers*, and *Calhoun*. For example, in *Brown II* the Court stated:

> "Full implementation of these constitutional principles may require solution of *varied local school* problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of *their proximity to local conditions* and the possible need for further hearings, *the courts which originally heard these cases can best perform this judicial appraisal.* Accordingly, we believe it appropriate to remand the cases to those courts.
>
> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been *characterized by a practical flexibility* in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of *these traditional attributes of equity power*. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a *variety of obstacles* in making the transition to

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school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision." (Emphasis added)

The opinion asserts that "most judges" do not possess the necessary competence to deal with the questions presented, and do not "know the rights questions, much less the right answers." Notwithstanding the foregoing assertion, the judges of the majority, acting on the appellate level, proceed to fashion a decree of such minute detail and specificity as to remove all discretion and authority from the district judges on whom the Supreme Court has relied so heavily. In my view the district judges are in much better position to know the questions and the answers than appellate judges who necessarily function some distance away from an evidentiary hearing and are removed from the "multifarious local problems" and "the variety of obstacles" inherent in the solution of the issues presented.

IV

Percentages, Proportions and Freedom of Choice

Freedom of choice means the unrestricted, uninhibited, unrestrained, unhurried, and unharried right to choose where a student will attend public school subject only to administrative considerations which do not take into account or are not related to considerations of race. If there is a free choice, free in every sense of the word, exercised by students or by their parents, or by both, depending on the circumstances, in accordance with a plan fairly and justly

administered for the purpose of eliminating segregation, the dual school system as such will ultimately disappear. *Goss v. Board of Education*, 373 U.S. 683 (1963); *Bradley v. School Board*, 345 F.2d 310,318 (4 Cir. 1965), vacated and remanded on other grounds, 382 U.S. 108 (1965 per curiam). See also *Clark v. Board of Educ. of Little Rock*, 369 F.2d 661 (8 Cir. 1966); *Deal v. Cincinnati Bd. of Educ.*, 369 F.2d 55,59 (6 Cir. 1966); *Lee, et al. v. Macon County Board of Education, et al.* (D.C. M.D. Ala. 1967) C.A. 604-E, ... F. Supp. ..... If the completely free choice is afforded and neither the students nor their parents desire to change the schools the students have heretofore attended, this Court is without authority under the Constitution or any enactment of Congress to compel them to make a change. Implicit in freedom of choice is the right to choose to remain in a particular school, perhaps the school heretofore attended. That in itself is the exercise of a free choice. The fact that Negro children may not choose to leave their associates, friends, or members of their families to attend a school where those associates are eliminated does not mean that freedom of choice does not work or is not effectively afforded. The assertion by the majority that "the only school desegregation plan that meets Constitutional standards is one that works" as interpreted by that opinion, simply means that students and parents will not be given a free choice if the results envisioned by the majority are not actually achieved. There must be a mixing of the races according to majority philosophy even if such mixing can only be achieved under the lash of compul-

sion. If the percentage of Negro and white children attending a particular school does not conform to the percentage of Negro and white school population prevalent in the community, the majority concludes that the plan of desegregation does not work. Accordingly, while professing to vouchsafe freedom and liberty to Negro children, they have destroyed the freedom and liberty of all students, Negro and white alike. There must be a mixing of the races, or integration at all costs, or the plan does not work according to the opinion. Such has not been and is not now the spirit or the letter of the law.

The aim and attitude of the majority is reflected by the following statement:

> "In reviewing the effectiveness of an approved plan it seems reasonable to use some sort of yardstick or objective percentage guide. The percentage requirements in the Guidelines are modest, suggesting only that systems using free choice plans for at least two years should expect 15 to 18 per cent of the pupil population to have selected desegregated schools."

Further the Court equates the percentage attendance test with percentages in jury exclusion[11] cases and

[11] One of the leading and most recent cases on jury exclusion is Swain v. Alabama (1965) 380 U.S. 202, 13 L.ed.2d 759. With respect to proportional representation on juries the Court concluded:

> "Venires drawn from the jury box made up in this manner unquestionably contained a smaller proportion

voter registration cases. It should be pointed out that such cases had no element of free choice in them, and therefore, the comparison is inapposite. In the instant cases the majority condemns a free choice plan unless it achieves the percentage result which suits the majority. Accordingly, the opinion concludes:

> "Percentages have been used in other civil rights cases. A similar inference may be drawn in school desegregation cases, when the number of Negroes attending school with white children is manifestly out of line with the ratio of Negro school children to white school children in public schools. Common sense suggests that a gross discrepancy between the ratio of Negroes to white children in a school and the HEW percentage guides raises an inference that the school plan is not working as it should in providing a unitary, integrated system."

There is no constitutional requirement of proportional representation in the schools according to race.

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of the Negro community than of the white community. But a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which the petit jurors are drawn." (p. 208)

Further, the Court in *Swain* quoted with approval the following statement from Cassell v. Texas, 339 U.S. 282, 286-287, 94 L.ed. 839, 847:

"Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation. Similarly, since there can be no exclusion of Negroes as a race and no discrimination because of color, proportional limitation is not permissible."

Furthermore, since there can be no exclusion based on race, proportional limitation is likewise impermissible under the Constitution.

We should be concerned with the elimination of discrimination on account of race, and freedom of choice is one means of accomplishing that goal. It is not our function to condemn the children or the school authorities because the free choices actually made do not comport with our own notions of what the choices should have been. When our concepts as to proportions and percentages are imposed on school systems, notwithstanding free choices actually made, we have destroyed freedom and liberty by judicial fiat; and even worse, we have done so in the very name of that liberty and freedom we so avidly claim to espouse and embrace. Our duty in seeking to eliminate racial discrimination is to vouchsafe to all children, regardless of race, a full, complete and timely free choice of schools in appropriate cases in keeping with sound administrative practices which take into consideration proper criteria. Both proportional representation and proportional limitation are equally unconstitutional.

V

Enforced Integration

The opinion seeks to find a Congressional mandate requiring compulsory or enforced integration in the public schools as distinguished from the elimination of segregation. Throughout the opinion there appear

a tangled conglomeration of words and phrases of various shades of meaning, all of which are equated with each other to reach the conclusion desired by the majority that school boards in this Circuit must adopt and implement a plan of forced integration.

It seems appropriate to return to the Civil Rights Act of 1964 and the legislative history which spawned its enactment in order to ascertain the true Congressional intent. Section 401(b), 42 U.S.C.A. § 2000c(b) defines desegregation in unequivocal terms:

> "'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

Section 407(a)(2) of Title IV, Title 42 § 2000c-6(a)(2) provides as follows:

> ". . .provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such *racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.*" (Emphasis added)

It should be noted that the portion of the language of the proviso which is underscored is omitted in the court's opinion. As to enforced integration the following statement by Senator Humphrey is exactly in point:

> "Mr. Humphrey. . .I should like to make one further reference to the *Gary* case. This case makes it quite clear that while the Constitution prohibits segregation, it does not require integration. . .The bill does not attempt to integrate the schools but it does attempt to eliminate segregation in the schools. . .The fact that there is a racial imbalance per se is not something which is unconstitutional. That is why we have attempted to clarify it with the language of Section 4." (110 Congressional Record 12717)

Likewise with respect to Section 407(a)(2) Senator Humphrey's statement clarifies and makes plain the Congressional intent by referring to the *Gary* case.[12]

The following additional excerpts from the legislative history serve to clarify the intent of Congress. Congressman Celler, Chairman of the Judiciary Committee of the House and Floor Manager of the bill:

> "There is no authorization for either the Attorney General or the Commissioner of Edu-

[12] Bell v. School City of Gary, Indiana, 213 F. Supp. 819 (1963).

cation to work toward achieving racial balance in given schools." (110 Congressional Record 1519, January 31, 1964)

Senators Byrd and Humphrey:

> "MR. BYRD of West Virginia. But would the Senator from Minnesota also indicate whether the words 'provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance' would preclude the Office of Education, under section 602 or Title VI, from establishing a requirement that school boards and school districts shall take action to relieve racial imbalance wherever it may be deemed to exist?
>
> "MR. HUMPHREY. Yes, I do not believe in duplicity. I believe that if we include the language in Title IV, it must apply throughout the Act." (110 Congressional Record, Page 12715, June 4, 1964).

Senator Javits:

> "MR. JAVITS. . .Taking the case of the schools to which the Senator is referring, and the danger of envisaging the rule or

regulation relating to racial imbalance, it is negated expressly in the bill, which would compel racial balance. Therefore there is no case in which the thrust of the statute under which the money would be given would be directed toward restoring or bringing about a racial balance in the schools. If such a rule were adopted or promulgated by a bureaucrat, and approved by the President, the Senator's State would have an open and shut case under Section 603. That is why we have provided for judicial review. The Senator knows as a lawyer that we never can stop anyone from suing, nor stop any Government official from making a fool of himself, or from trying to do something that he has no right to do, except by remedies provided by law. So I believe it is that set of words which is operative." (110 Congressional Record, Page 12717, June 4, 1964).

Senators Byrd and Humphrey:

"MR. BYRD of West Virginia. . .Cannot the Office of Education, pursuant to carrying out this regulation, deny assistance to school districts wherein racial imbalance exists?

MR. HUMPHREY. Let me read from the substitute: Provided, that nothing herein shall empower any official or court of the United States to issue any order.

MR. BYRD of West Virginia. 'To issue any order', but does it provide that the Office of Education shall not cut off Federal assistance?

MR. HUMPHREY. But in order to cut off Federal assistance, the President would have to issue the order, if the Senator will read Section 602.

MR. BYRD of West Virginia. The words are: No such rule, regulation, or order shall become effective unless and until approved by the President.

MR. HUMPHREY. That is correct.

MR. BYRD of West Virginia. What assurance does the Senator give me that the President will not approve such a requirement?

MR. HUMPHREY. Because I do not believe the President will violate the law." (110 Congressional Record, Page 12715, June 4, 1964).

In order to escape the clear meaning of the quoted statutes and the unquestioned intent of Congress as illustrated by the legislative history, the opinion summarily obliterates any distinction between desegregation and integration. Within the context of the opinion integration means forced or enforced integration. Again the term integration is applied only to *de jure* segregated schools. An analysis of the opinion demon-

strates that the process of reasoning used amounts to an unauthorized insertion of the word "de jure" to achieve and maintain the de facto and de jure distinction with which I dealt earlier. By means of this device the opinion converts the Civil Rights Act of 1964 into a new and different concept entirely foreign to its true meaning. I quote several typical excerpts from the opinion:

> "We use the terms 'integration' and 'desegregation' of formerly segregated public schools to mean the conversion of a *de jure* segregated dual system to a unitary, nonracial (nondiscriminatory) system—lock, stock, and barrel: students, faculty, staff, facilities, programs, and activities." (Emphasis added) (footnote 5, page 6)
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> * * *
>
> *"The national policy is plain: formerly de jure segregated public school systems based on dual attendance zones must shift to unitary nonracial systems—with or without federal funds."* (Emphasis in orig.) (page 14)
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> * * *
>
> "Although the legislative history of the statute shows that the floor managers for the Act and other members of the Senate and House cited and *quoted these two opinions* they did so within the context of the problem of *de facto segregation.*" (Emphasis added) (Page 39) [The two cases mentioned are *Briggs* and *Bell.*]
>
> * * *

> "As used in the Act, therefore, 'desegregation' refers only to the disestablishment of segregation *in de jure segregated schools.*" (Emphasis added) (page 74)
>
> * * *
>
> "Senator Humphrey spoke several times in the language of *Briggs* but his references to *Bell* indicate that the restrictions in the Act were pointed at the Gary, Indiana *de facto type of segregation.*" (Emphasis added) (page 80)

Again it should be said that it is not easy to understand the reasoning by which the majority concludes that the Federal Constitution requires integration of formerly *de jure* school systems but does not require the integration of de facto systems. Apparently faced with this dilemma the majority realized that it must challenge the jurisprudence established by *Briggs v. Elliott* (E.D. S.C. 1955) 132 F. Supp. 776, and *Bell v. School City of Gary* (N.D. Ind. 1963) 213 F. Supp. 819, affirmed 324 F.2d 209 (7 Cir. 1963). The opinion refers to these cases as "two glosses on Brown". The repeated assertions of Senators showing their reliance upon the two decisions in question give emphasis to the meaning of the teaching of those two cases. Senator Humphrey actually stated that the thrust of Judge Beamer's opinion in the *Gary* case was incorporated into the Civil Rights Act of 1964.[18] The majority disposes of Senator Humphrey's comment and the *Gary* case by asserting that the school

[18] See opinion page 81.

districts were drawn without regard to race. The following is from the opinion:

> "Senator Humphrey spoke several times in the language of *Briggs* but his references to *Bell* indicate that the restrictions in the Act were pointed at the Gary, Indiana de facto type of segregation." (opinion page 80)

While it may be true that the facts in *Gary* showed good faith on the part of the school board, it is likewise true that the Gary school system involved de jure segregation within the meaning of the majority opinion. We quote from Judge Beamer's opinion, 213 F. Supp. at 822:

> "Prior to 1949, Gary had segregated schools in what is commonly known as the Pulaski Complex. Two schools were built on the same campus, one was called Pulaski-East and the other Pulaski-West. One was occupied by Negro students and the other by white students. This was in accordance with the separate but equal policy, then permitted by Indiana law, (Burns Indiana Statutes Annotated, 1948 Replacement, Section 28-5104)"

The difficulty of the majority is further increased by virtue of the fact that Judge Beamer cited cases which uphold the *Briggs* doctrine. More important, when the case was affirmed by the Court of Appeals of the Seventh Circuit, the so-called *Briggs* dictum

was cited as authority for the court's holding, 324 F.2d at 213.

If the alleged *Briggs* dictum is so clearly erroneous and constitutionally unsound, it is difficult to believe that it would have been accepted for a period of almost twelve years and quoted so many times. Even the majority concedes that the court in *Briggs* was composed of distinguished jurists, Judges Parker, Dobie and Timmerman. If the majority is correct, it is entirely likely that never before have so many judges been misled, including judges of this Court,[14] for so long by such a clear, understandable, direct and concise holding as the language in *Briggs* which the opinion now condemns. The language is straightforward and simple: "The Constitution, in other words, does not require integration. It merely forbids discrimination."

It is interesting also to observe that the Supreme Court has never disturbed the *Briggs* language, although it has had numerous opportunities to do so. As a matter of fact, it has come very close to approving it; if it has not actually done so. In the case of *Shuttlesworth v. Birmingham* (N.D. Ala. 1958) 162 F. Supp. 372,378, the district court speaking through Judge Rives quoted the *Briggs* opinion. The Supreme Court affirmed the judgment. *Shuttlesworth v. Birmingham*, 358 U.S. 101.

The majority rule requiring compulsory integration is new and novel, and it has not been accepted

[14] See the very clear dissenting opinion of Judge Cox.

by the Supreme Court or by the other Circuits. The rationale of *Briggs* has been approved. *Brown* decisions, *supra; Goss v. Bd. of Educ. of Knoxville, supra; Bolling v. Sharpe,* 347 U.S. 497,498; *Pennsylvania v. Board of Trusts,* 353 U.S. 230,231; *Cooper v. Aaron,* 358 U.S. 1 (passim); *Scull v. Virginia,* 359 U.S. 344,346; *Wolfe v. North Carolina,* 364 U.S. 177,182; *Gomillion v. Lightfoot,* 364 U.S. 339,349; *Garner v. Louisiana,* 368 U.S. 157,178; *Turner v. City of Memphis,* 369 U.S. 350,353; *Johnson v. Virginia,* 373 U.S. 61,62; *Wright v. Rockefeller,* 376 U.S. 52, 57-58; *Springfield v. Barksdale* (1 Cir. 1965) 348 F.2d 261; *Bradley v. School Board of Richmond, Va.* (4 Cir. 1965) 345 F.2d 310; *Swann v. Charlotte-Mecklenburg Board of Educ.* (4 Cir. 1966) 369 F.2d 29; *Deal v. Cincinnati Board of Educ.* (6 Cir. 1966) 369 F.2d 55; *Bell v. School City of Gary, Indiana* (7 Cir. 1963) 324 F.2d 209; *Clark v. Board of Educ. of Little Rock* (8 Cir. 1966) 366 F.2d 661; *Downs v. Board of Educ. of Kansas City* (10 Cir. 1964) 336 F.2d 988, cert. den., 380 U.S. 914.

Conclusion

It is my judgment that the de facto-de jure distinction created in the opinion can not be supported as a matter of law. Percentage or proportional enrollment requirements based on race, and enforced integration are in violation of well established constitutional concepts in my opinion.

While it cannot be denied there has been recalcitrance and resistance to desegregation as required

by the *Brown* decisions in numerous areas, I cannot share in the pessimism expressed in the opinion. Throughout the country a substantial effort has been made to eliminate segregation and substantial progress has been made. The *Brown* decisions contemplated some difficulties and complexities. A review of the history of the difficulties involved strongly indicate that the greatest problems arise when a start or "break through" is initiated. Recalcitrance and resistance which appeared initially in many areas have now subsided or disappeared. It is also true that the emphasis has shifted properly from "deliberate" to "speed". I continue to have confidence in the local school boards of the nation. While some of them have performed slowly and a few have not performed at all, the vast majority of school boards are composed of conscientious, civic minded, sincere people who are undertaking to do what is best for the school children of the nation. We should not interfere with them unduly.

Furthermore, I continue to have confidence in the judicial system of the country and hold the firm belief that the record of the courts in achieving compliance with the *Brown* decisions demonstrates that the courts have given their prompt, careful and diligent attention to the problems as they have arisen. In my view the heaviest burden has been on the district courts, and inevitably the best solutions will come at the district court level where the judges are in close contact with local complexities, obstacles and problems. The primary responsibility should be left where the *Brown* decisions placed it, with the boards of education under the supervision and guid-

ance of the district courts. This is not to say that the courts should not accord full consideration to the expertise of the Department of Health, Education and Welfare; and we should give due consideration to HEW Guidelines when it is appropriate to do so. However, the provisions of the Civil Rights Act of 1964 should not be by-passed. Rules, regulations and orders of general application should be enacted in accordance with the requirements of due process and school systems should not be penalized by such rules, regulations or orders which are not approved by the President as provided by the Act. It is no answer to say that the guidelines are interpretive regulations or "housekeeping" rules. They are being used and applied as general rules, regulations or orders.

Due to developments in the jurisprudence, particularly with respect to desegregation of faculty and staff, the orders of the district courts should be vacated and the causes remanded for further consideration and for evidentiary hearings in the district courts. In effect the appellees recognize the fact that this must be done. We should not reverse the district courts on questions which were not issues before them and fashion our own decree with respect to such issues without any evidentiary basis or without affording an opportunity for the presentation of evidence relating to such issues in the district courts.

Judge BELL, with whom Judge GEWIN joins, DISSENTING:

I respectfully dissent. The two-judge or original opinion of December 20, 1966 is what the majority has

adopted. That opinion seriously erodes the doctrine of separation of powers as between the Executive and the Judiciary. Moreover, much of its language is in the nature of overreach and, as such, adds confusion and unrest to the already troubled area of school desegregation. The overtones of compulsory integration and school racial balances in the original opinion can only chill the efforts of school administrators to complete the task of eliminating dual school systems of the South. In addition, the other side of some of the more important holdings of the majority opinion should be considered and those propositions stated which militate against their validity.

The plain intent of the two opinions is to establish a uniform law for the school systems of this circuit. Thus, the opinions must be tested as laws. Their validity and efficacy as laws should be considered in the frame of reference of need, fairness, clarity and what is constitutionally permissible.

It is fundamental in law making that laws should be fair as between people and sections. The requirement that laws be clear in meaning is also a fundamental. We cannot be expected to obey the law if we cannot understand it. Caligula kept the meaning of the laws from the Romans by posting them in narrow places and in small print[1]—it is no different today when the law is couched in vagueness.

[1] Suetonius, The Lives of the Twelve Caesars, (Random House, 1959), p. 191, 192.

Then there is the matter of personal liberty. Under our system of government, it is not to be restricted except where necessary, in balance, to give others their liberty, and to attain order so that all may enjoy liberty. History records that sumptuary laws have been largely unobserved because they failed to recognize or were needlessly restrictive of personal liberty. Our experiments with sumptuary-like laws are exemplified by the *Dred Scott* decision, 19 How. 393, Reconstruction, and the prohibition laws. All failed.

The majority opinions, considered together, fail to meet the tests of fairness and clarity. The advance approval given to a requirement of compelled integration exceeds what is constitutionally permissible under the Fourteenth Amendment. They cast a long shadow over personal liberty as it embraces freedom of association and a free society. They do little for the cause of education.

It is important, however, that this dissenting opinion not mislead any person having responsibility in the area of school desegregation. The dual system of education must be eliminated. This was ordered in 1955. *Brown v. Board of Education of Topeka*, 1955, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083. School boards were told to convert the dual segregated school systems into racially nondiscriminatory school systems. The court pointed to problems that might arise in the transition with respect to the physical condition of school plants, transportation, personnel, and in the revision of school districts and

attendance areas into compact areas. This order followed reargument of the question of remedy after the 1954 decision holding segregated education under the separate but equal doctrine unlawful. *Brown v. Board of Education*, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873. After full argument, the transition was ordered. The separate but equal doctrine was already lost and the time for remedy was at hand. Transition was the remedy provided.

Transition to date has in the main consisted of following a freedom of choice plan for pupil assignment. But freedom of choice without faculty desegregation and the elimination of discrimination in buildings, equipment, services and curriculum will not suffice to convert a dual system into a unitary nondiscriminatory system. The slow progress to date toward eliminating dual systems is what has brought about the majority opinions, and is also at the root of the disturbance between the Health, Education, and Welfare Department and many school boards. The objective must be, as the Department of Justice contends, that there be no white schools—no Negro schools—just schools. But this is all that is required and it can be accomplished without the open-end compulsory integration language of the majority opinions, or the geometric progression guidelines[2] of HEW which the majority opinion approves.

[2] Even while these cases were pending after en banc argument, HEW announced new guidelines. Now for a school system to receive approval without further investigation, it must show that the number of minority group students in integrated schools within the system in the school

The mandate of the Supreme Court in *Brown II* can be carried out by the assignment of faculty and students without regard to race, and by affording equality in educational opportunity from the standpoint of buildings, equipment, and curriculum. Where freedom of choice in student assignment is ineffective to the extent that a dual system continues, it can be implemented by a neighborhood assignment plan. Assignments should then be made by the school board to the school nearest the home of the student, whether formerly white or Negro. Then the child would be given the option under a freedom of choice plan of attending another school with priority to attend being based on proximity of residence to school. This method of student assignment is comparable to what is being used in Charlotte. *Cf. Swann v. Charlotte-Mecklenburg Board of Education*, 4 Cir., 1966, 369 F.2d 29 (En banc).

We should order the school boards in these cases, which they and the entire court agree must be reversed, to forthwith complete the conversion from dual to unitary systems by the use of these minimum but mandatory directions. School boards and the public would understand the objective—to convert dual school systems into unitary nondiscriminatory systems just as the Supreme Court directed twelve years ago. School boards and the public would also understand the method to be followed in the conversion. But this approach is too simple for the majority. Their view is that something

year 1967-68 will be double the number present in 1966-67 and in some instances triple the number. New Orleans Times-Picayune, March 16, 1967, page 1, Column 4, Associated Press.

more is required—a result which brings about substantial integration of students. The mandatory assignment of students based on race is the method selected to achieve this result. This is a new and drastic doctrine. It is a new dimension in constitutional law and in race relations. It is new fuel in a field where the old fire has not been brought under control.

PROCEDURAL DUE PROCESS AND THE APPROVAL OF THE GUIDELINES

The scope of the majority holding as to the binding force on the federal courts of the HEW guidelines in the area of school desegregation posed a serious separation of powers question. That fact alone should have indicated that the validity of the HEW guidelines was of primary concern. One of the major premises of the original or panel opinion is that HEW excuses those school systems which are under court order from compliance with its guidelines; hence, the necessity of the court setting the guidelines as minimum standards to prevent the courts from being used as an escape route. The original HEW Regulation promulgated in 1964 makes this possible. Title 45A, CFR, § 80.4(c). The HEW statement of policy of 1965, Title 45, CFR, § 181.4, receded from this position but the latest HEW policy supersedes the 1965 statement which includes § 181.4, *supra*. See HEW March and December 1966 Statements—not reported in CFR.

The HEW Statements of Policies for School Desegregation are referred to generally in the school de-

segregation world as guidelines. At least three such statements have been issued; one in 1965, one in March 1966, and another in December 1966. There apparently have been amendments. Footnote 2, *supra*. No guidelines whatever were in issue in the lower courts.[a] The guidelines of March 1966 had not been promulgated when the cases were there. Indeed the guidelines of December 1966 had not been promulgated when the cases were submitted after argument to the original panel of this court. The fact that they had not been in issue did not deter the court in the original opinion. There it was held that the ". . . HEW guidelines now in effect are constitutional and are within the statutory authority created in the Civil Rights Act of 1964". This perhaps meant all guidelines promulgated up to the date of the opinion, December 29, 1966. Any doubt as to the inclusion of the December 1966 guidelines was resolved when the majority in the en banc per curiam opinion stated that the 1965 and 1966 HEW guidelines are within the decisions of this court and comply with the letter and spirit of the Civil Rights Act of 1964 and meet the requirements of the United States Constitution. This is adjudication without any semblance of due process of law. It is an unprecedented procedure and a shocking

[a] The practice of hearing appeals in school cases on old records is very unsatisfactory. We do not know what changes in desegregation plans may have been made in the interim. It is a rapidly changing public area where plans as well as the law are in flux. Cf. *Calhoun v. Latimer*, 1964, 377 U.S. 263, 84 S.Ct. 1235, 12 L.Ed.2d 288, where the court took note of a supervening plan and remanded for an evidentiary hearing in the District Court.

departure from even rudimentary due process.[4] Approval of future guidelines is limited by the majority to those ". . . within lawful limits."

The theory of the court escape route and the necessity to hold all guidelines valid is apparently developed in the interest of supporting the national policy, as expressed in the Civil Rights Act of 1964, of eliminating discrimination in public education. The general theme of the majority is that HEW has the carrot in the form of federal funds but no stick. A stick is needed in those situations where a school board may not take federal funds. The aim is to make a stick out of the federal courts. The courts should cooperate with HEW but they cannot be made to play the part of any stick that HEW may formulate and this is the tenor of the original opinion. Courts are restricted to acting within the limits of the Fourteenth Amendment in the school desegregation area. It may or may not be proper for a court to act within the limits of what the HEW policy may be in allocating federal school funds. Sometimes there may be a difference. A decent respect for the judiciary dictates that we make this plain.

[4] Section 602 of Title IV of the Civil Rights Act of 1964, 42 USCA, § 2000d-1 provides that no rule, regulation or order of HEW shall become effective unless and until approved by the President. Whether the guidelines are such rules or regulations cannot be decided without an evidentiary hearing concerning their meaning through application. This question has never been put in issue in these cases.

THE STANDARD REQUIRED BY THE MAJORITY IS UNCONSTITUTIONALLY VAGUE

The original opinion states in two places that the only satisfactory plan for desegregating a school system is one that works. One looks in vain for a definition of "one that works". This is manifestly a vague standard. It cannot be followed. Moreover, it is subject to selective enforcement and a statute couched in such language would be patently unconstitutional.

In another place in the original opinion the statement is made that substantial integration must be achieved in disestablishing dual school systems. This is not clear. What is substantial? Is the reference simply to a system, or to each school, or to each class room?

The en banc per curiam opinion may have attempted to improve the standard by saying that the criterion for determining the validity of a provision in a school desegregation plan is whether the provision is reasonably related to accomplishing the objective of educational opportunities on equal terms to all. Who knows the meaning of this? There is no mention of result.

These vague standards are perhaps the most mischievous parts of the majority opinions. They place unfettered discretion in HEW in the area of school desegregation. No school board will ever know when it has performed its duty to eliminate the dual school system. No school board will ever know whether federal funds will be made available. This type of standard

places school systems under men and not laws. School boards and school patrons are entitled to a clear and definite standard. The problem of desegregation will not be solved absent a clear standard.

THE DE JURE-DE FACTO DOCTRINE IS INFAIR

The unfairness which inheres in the majority opinion stems from the new doctrine which the original panel fashioned under the concept of classifying segregation into two types: de jure segregation, called apartheid, for the seventeen southern and border states formerly having legal segregation; and de facto segregation for the other states of the nation. This distinction, which must be without a difference and somewhat hollow to a deprived child wherever located, is used as a beginning. The original opinion then goes on to require affirmative action on the part of the school authorities in the de jure systems to integrate the schools. The neighborhood school systems of the nation with their de facto segregation are excused. The Constitution does not reach them.[5]

This reasoning is necessary to reach the end of compulsory integration in the so-called de jure states. It is the counterpart to overruling the settled construction of the Fourteenth Amendment, to be next discussed, that integration is not commanded. The restrictions in the Civil Rights Act of 1964 against requiring school racial balances by assignment and transportation are written

[5] The legislative history of the Civil Rights Act of 1964 does not show that Congress acted on a de jure-de facto basis. I would not attribute such a form of sectionalism to the Congress.

out of the law with respect to the de jure states by using the de jure-de facto theory. Title IV, §§ 401(b), 407(a), 42 USCA, §§ 2000c(b), 2000c-6. The overruling of the constitutional limitation removes the other impediment to compulsory integration. The way is thus cleared for the new dimension. The only question left is when, and to what extent. The authority to HEW is carte blanche. We should disavow the de jure-de facto doctrine as being itself violative of the equal protection clause. It treats school systems differently. It treats children differently. It is reverse apartheid. It poses the question whether legally compelled integration is to be substituted for legally compelled segregation. It is unthinkable that our Constitution does not contemplate a middle ground—no compulsion one way or the other.

The de jure-de facto doctrine simply is without basis. Segregation by law was legal until the *Brown* decision in 1954. Such segregation should hardly give rise to punitive treatment of those states employing what was then a legal system. The Supreme Court has never so indicated. Moreover, the Supreme Court holding in *Brown* was based on the finding that segregated education was unequal. How can it be unequal in one section of the country and not another? Does *Brown* interdict only segregation imposed affirmatively by law, or does its rationale also include the state action of holding to neighborhood assignments thereby perpetuating de facto segregation? The majority decision limits the rationale to the southern and border states type of segregation formerly imposed affirmatively by law. In such event compelled integration may be required in the de jure

states but the logic of reaching this point, because of the restrictions in the 1964 Act to the contrary, excuses the de facto states from the Act and the Constitution.

The real answer is that no such new doctrine or theory is necessary. The schools of the South and border states must do what the Supreme Court has ordered—convert dual school systems into unitary nondiscriminatory school systems. The constitutional power already exists in the courts to see that this is done. This newly discovered source of power tends only to disturb settled doctrine. Its purpose can only be to require racial balances in the de jure states.

THE BRIGGS DICTUM

It is a settled constitutional principle that the Fourteenth Amendment does not require compulsory integration but only proscribes segregation. It is the state action segregation which violates the equal protection clause. We have so stated in the following cases: *Avery v. Wichita Falls Independent School District*, 1956, 241 F.2d 230; *Borders v. Rippy*, 1957, 247 F.2d 268; *Rippy v. Borders*, 1957, 257 F.2d 73; *Cohen v. Public Housing Administration*, 1958, 257 F.2d 73; *City of Montgomery v. Gilmore*, 1960, 277 F.2d 364; *Boson v. Rippy*, 1960, 285 F.2d 43; *Stell v. Savannah-Chatham County Board of Education*, 1964, 333 F.2d 55; *Evers v. Jackson*, 1964, 328 F.2d 408; *Lockett v. Board of Education of Muscogee County*, 1965, 342 F.2d 225.

This principle is euphoneously referred to in the original two-judge opinion as the *Briggs* dictum. It was stated in *Briggs v. Elliott*, E.D.S.C., 1955, 132 F. Supp. 776, but no court, until now, has ever held the Fourteenth Amendment to mean otherwise. The Amendment is entirely negative in character. The original panel, as a part of its two-pronged approach to compulsory integration, overruled this principle *sub silentio*.

The court, sitting en banc, could overrule this settled principle and the majority has now done so to an unknown extent in paragraph 3 of the per curiam opinion. We will not know the extent until the question of racial percentages is squarely presented. Here, as I understand the per curiam opinion, the question is tangential except as it relates to converting to a unitary school system. In the first sentence of paragraph 3 the majority holds that school boards have the affirmative duty under the Fourteenth Amendment to bring about a unitary school system in which there are no Negro or white schools—just schools. We can all agree on this statement. The opinion does away with any distinction between the terms "integration" and "segregation" in the field of school desegregation law insofar as the distinction interferes with the affirmative duty to bring about unitary school systems. We can all agree on this. It is then said that in fulfilling this duty it is not enough for school authorities to offer Negro children the opportunity to attend formerly all white schools but that such opportunity must be coupled with the integra-

tion of faculty, facilities, and activities. Then, without more, the decisions of this court setting out this principle are overruled to the extent that they conflict with the view of the majority. I am left in doubt as to whether this is a retrenchment from the panel decision. Time will tell.

It may be added that if the court is overruling this settled constitutional principle, it brings this circuit into conflict with the First, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits. *Springfield v. Barksdale*, 1 Cir., 1965, 348 F.2d 261; *Bradley v. School Board of Richmond, Virginia*, 4 Cir., 1965, 345 F.2d 310; *Swann v. Charlotte-Mecklenburg Board of Education*, 4 Cir., 1966, 369 F.2d 29; *Deal v. Cincinnati Board of Education*, 6 Cir., 1966, 369 F.2d 55; *Bell v. School, City of Gary, Indiana*, 7 Cir., 1963, 324 F.2d 209, cert. den., 377 U.S. 924, 84 S.Ct. 1223, 12 L.Ed.2d 216; *Clark v. Board of Education of Little Rock*, 8 Cir., 1966, 366 F.2d 661; and *Downs v. Board of Education of Kansas City*, 10 Cir., 1964, 336 F.2d 988, cert. den., 380 U.S. 914, 85 S.Ct. 898, 13 L.Ed.2d 800. The case of *Taylor v. Board of Education of New Rochelle*, 2 Cir., 1961, 294 F.2d 35 is not to the contrary. There the remedy fashioned was freedom of choice imposed on neighborhood assignments. The case of *Board of Education of Oklahoma City v. Dowell*, 10 Cir., 1967, ... F. 2d ...., [slip opinion dated January 23, 1967], does not appear to be to the contrary. The court distinguished *Downs* by pointing out that *Dowell* involved a finding of bad faith on the part of the school board in carrying out the original order of the District Court to disestablish the dual school system.

It is hard to know just what the court has held as between the panel decision and the en banc per curiam decision. The labored effort to establish the de jure-de facto concept and to overrule this constitutional principle hardly seems calculated as an exercise in semantics. It is more in the nature of judicial lagniappe for use on another day. We will know the full import of the opinions when a motion is presented to assign children on the basis of race so as to comply with what each particular movant may deem to be, in his view, a desirable racial composition for the particular school or schools. This leaves the law in a very unsatisfactory state and portends of utter confusion for school boards.[6]

[6] A good example of the problems to be encountered in eliminating the dual school system is to be seen in the Taliaferro County, Georgia school system. See *Turner v. Goolsby*, S.D. Ga., 1965, 255 F.Supp. 724, for background. There were only two schools in the system and the board desegregated, effective in September 1966, on the basis of converting the white school into an elementary school and the Negro school into a high school. A perfect racial balance would be accomplished under the plan. In 1965 there were approximately 600 Negro children and 200 white children enrolled in the system. The records of the Georgia State Department of Education as of January 19, 1967 indicate that there are now 527 Negro students enrolled in the Taliaferro County school system and no white students. This result raises serious questions. How is a "plan that works" to be formulated for this school system? What number of white students will be needed to make it work? Where will they come from? How will they be selected? Will a lottery system be used? Will they be compelled to attend the Taliaferro County school system? If so, how? Will the taxpayers of the system be compelled to pay for educating children brought in from outside the system? Will the court ignore system lines although the laws of Georgia provide for separate school systems? What measures will be employed to avoid resegregation through families removing their residences from the school system? Granted this is an extreme example but it is nevertheless a factual situation.

THE DECREE

The use of a uniform decree, as the majority points out, is not novel. Our school desegregation decisions have tended toward uniformity in the freedom of choice method of assignment and in the administration of such plans. A uniform decree within the limits of minimum standards would aid school boards and the district courts but the uniform decree entered in this case can be faulted because of its detail. This comes about through the unbounded aim of the court to track the HEW guidelines. It must be remembered that decrees may have to be enforced by the court and a court should guard against being put in the unfeasible position of having to hear motions based on the alleged breach of some minor and insubstantial provision of its decree. It is also not clear to me that sufficient latitude is left to the district courts to adjust such practical difficulties as may arise under the detail of the decree.

HEW has an advantage over the district courts, as the court has now restricted them, in the execution of school desegregation plans. HEW may delay, excuse, and change. HEW may vary its requirements as between systems. The majority has left no such power in the district courts. They are admonished to follow HEW but it is a sad day for the district courts, and for the entire judiciary as well as for the principle of separation of powers when the only discretion left them is within the limits to be set by HEW.

It also would appear improper to constitute the courts as overlords of the school systems of this circuit to the extent done in the uniform decree. The district courts must require school equalization to the extent set out in paragraph VI of the decree. Its scope is only a short step from taking over curriculum. The building improvement provision moves the courts in the direction of levying local taxes. Ordering school boards to discontinue the use of buildings could amount to taking property without due process and just compensation. These are drastic measures and there are no facts before the court to demonstrate the necessity for them. It is entirely proper for the District Court to disapprove new construction where it will perpetuate the dual school system but this is a matter for complaint and hearing rather than for advance supervision as is required under § VII of the decree.

By way of summation, I reiterate that the majority opinions are unfair to the extent that they discover or establish and then rely upon the de jure-de facto divisive sectional theory. The opinions expand, without constitutional authority, the requirement that dual school systems be converted into something more than unitary school systems: to-wit, that substantial integration be achieved in the respective school systems. This added requirement is itself impermissibly vague as a standard without further delineation. The opinions unduly restrict personal liberty to the extent that compelled integration is approved or re-

quired, and in this regard improperly overturn and expand the settled meaning of the Fourteenth Amendment. The court errs in prematurely holding that the guidelines issued by HEW are constitutional and within the scope of the Civil Rights Act of 1964. No guidelines whatever were considered by the district courts. Some of those approved had not been written.

My own view is that the law makes no such requirement as the majority of the court imposes. No such radical departure is necessary to accomplish what the Supreme Court has directed the lower courts to accomplish—the elimination of the dual school system. The Supreme Court has not said that every school must have children from each race in its student body, or that every school room must contain children from each race, or that there must be a racial balance or a near racial balance, or that there be assignments of children based on race to accomplish a result of substantial integration. The Constitution does not require such. We would do well to "stick to our last" so as to carry out the Supreme Court's present direction. It is no time for new notions of what a free society embraces. Integration is not an end in itself; a fair chance to attain personal dignity through equal educational opportunity is the goal. My view, however, is now lost in this court; hence this DISSENT.

COLEMAN, Circuit Judge. SEPARATE OPINION.

These cases remind me of what Mr. Chief Justice Chase said in *Texas v. White*:[1]

> "We are very sensible of the magnitude and importance of this question, of the interest it excites, and of the difficulty, not to say impossibility, of so disposing of it as to satisfy the conflicting judgments of men equally enlightened, equally upright, and equally patriotic. But we meet it in the case, and we must determine it in the exercise of our best judgment, under the guidance of the Constitution alone."

This Court, exercising only such appellate jurisdiction as Congress has seen fit to confer upon it, confronted solely by a question of how best to preserve an already settled Constitutional right, should be guided *by the Constitution alone and by nothing else.*

No one denies that to an incalculable degree the future of this Country depends inescapably upon the continued, constantly improved education of *all its inhabitants.* Nor can it very successfully be denied that the best practical hope of attaining this objective is to be found and maintained in the public schools. It became plain over a hundred years ago that private schools did not and could not reach the masses of the people.

Compulsory discrimination in the public schools, founded on race or color, is Constitutionally dead. No

[1] 74 U.S. 700,720; 7 Wall 700; 19 L. Ed. 227 (1868).

Judge would dispute this. Existentially it is like the wounded animal which bounds on for awhile after it has been fatally shot. The critical problem now is that we must not wreak irreparable injury upon public schools while executing the sentence of death against compulsory segregation. Thoroughly realizing this, the Supreme Court left the details of the eradication to the sound judicial discretion of the District Courts, subject only to appellate review. To this day this assignment has not been changed. I do not suppose in our form of government that it could be changed. Courts alone make binding adjudications on questions of Constitutionality, and litigation must begin at the District level.

The public schools of the Nation, not just those of a particular section, are now caught up at the second battleground, legal and political, not about the death of unlawful discrimination but about who and how many of any particular race shall go to any particular school with how many members of some other race. If one looked only at the great volume of litigation and its accompanying strife and publicity he would jump to the conclusion that nothing matters but the racial composition of any educational facility. This is pursued regardless of the real preferences, exercised in genuine freedom, of those directly involved, that is, those who must have an education. In the ultimate this could become a great tragedy for those most affected. An educational house divided against itself may have trouble standing. It certainly cannot operate with maximum effectiveness.

In the light of these considerations, as one who was able to secure an education solely because there was a public school in which there was an opportunity to obtain it, I shall now express my views, as one Judge of this Court, individually, as to the decision now about to be rendered.

In doing so, I proceed upon the thesis that there is nothing at all inconsistent about being, at the same time, both a loyal American and a Southerner. I think Andrew Jackson conclusively settled that point over a century ago.

It is particularly unfortunate if our decision in these cases is in any way to be grounded on old scores against the States of this Circuit. This is contrary to American legal tradition; it opens old wounds, rekindles old fires, and lends itself as a weapon to the futile cause of further intransigency. Prior to 1954, racially separate, if equal, schools had not been condemned as unconstitutional. One is not to be punished or harassed for an act which was lawful when it was done. Indeed, such condemnation in this instance would inferentially include some of the most highly respected Judges who ever graced the Supreme Court. They had opportunities to condemn the system but, in the exercise of perfect judicial integrity, did not. As I understand it, an Omnipotent God does not change yesterday when it is past and gone. Certainly this Court cannot do it. We are now concerned with rectifying the errors of the present and forestalling, if we can, the anticipated errors of the future. I decline to participate in any ex post facto condemnations. I pre-

fer to believe that this Court is not deliberately doing so.

I further believe that whatever the Fourteenth Amendment requires of any State it requires of all States. If we are requiring something here in the enforcement of Fourteenth Amendment rights that should not be required of all fifty States then we have exceeded our authority and we have misapplied the Constitution. I agree with the action of the majority opinion in disclaiming any intention of passing on the validity of educational operations in other Circuits. That matter is not and cannot be before us.

It is out of regard for the desirability of Constitutional uniformity that I agree, in principle, with the attempt to formulate a decree for the future guidance of District Courts in this Circuit. It is obvious that such a decree cannot adjudicate cases in advance of a hearing in the District Court, nor can it be applied in the absence of factual justification.

The decree speaks for itself, of course, but I interpret it to deal at this point with making freedom of choice a reality instead of a promise. I do not understand that this Court has abandoned freedom of choice, if that choice is real instead of illusory.

Nor do I understand it to direct that there shall be a specified percentage of the various races in any particular public school or that there shall be proportional representation of the races brought about by

arbitrary order. I agree with Judges Gewin and Bell that the opinion strongly portends such a possibility. But paragraph 5 of the en banc opinion certainly disclaims any such intention. The District Courts are left free to consider all the evidence, including racial attendance percentages, in determining whether the children of any particular school district have been offered a reality instead of a shadow. It is to be anticipated that the bridge will later have to be crossed when we come face to face with a situation wherein there can be no doubt of the freedom but the results are displeasing and are attacked solely for that reason.

I think it all boils down to this. We once had the doctrine of separate but equal. We did not, I am sorry to say, pay much attention to the "equal". We now have freedom of choice. As Judge Bell so splendidly states it, we are now going to have to make certain of the "freedom". To fail in this is to invite other action which at this time I regard as unconstitutional but which could soon be made Constitutional.

The decree is not as I would have written it had I been charged with sole responsibility for the effort. No offense is intended when I doubt that it is perfect. For example, the *en banc* opinion says that "boards and officials administering public schools in this circuit have the affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system". Yet II (o) of the decree prohibits any official from influencing parents or students in

the exercise of a choice. In other words, if the officials feel that Negro children should be encouraged to apply for admission to a formerly white school they are prohibited from doing so. They are to be condemned, on appearances, if no Negro child chooses to attend a formerly white school; they are not allowed, in the exercise of ordinary freedom of speech, to discuss the matter with Negro children with a view to their exercising a preference in favor of attending a school they have not formerly attended. The school official cannot win. In one breath he is told to act; in the next he is immobilized.

Experience will hone away these inconsistencies and impossibilities. This Court has drafted uniform decrees on prior occasions. These are now speedily outmoded, if not abandoned. Judges, like other human beings, do not always write in granite; they often find that they have only marked in the sand.

Since the HEW guidelines were not the subject of a hearing in the Courts below I do not discuss them here. In my view, they are not now before this Court.

The focal point of the whole matter is the action of the *en banc* opinion repudiating *Briggs v. Elliott* and over-ruling our prior opinions which followed the same rationale, see Footnotes 1 and 2 for the citations.

It is my view that these prior cases were correctly decided. Other Circuit Courts in this Country appear

to feel likewise. If the reasoning in these over-ruled cases is incorrect then we simply face the following:

The freedom of the Negro child to attend any public school without regard to his race or color, first secured in the *Brown* cases, is again lost to him after a short life of less than thirteen years. He is left open to a future adjudication that although he does not wish to attend School A and has in fact expressed a desire to go elsewhere this is of no importance. Because of his race he can be assigned to a particular school to achieve a result satisfactory to someone who probably does not even live in the district but who wishes to make a racial point. Thus the child reenters the same racial discrimination from which he escaped so short a time ago. He remains bogged in race. Moreover, when Negro children are to be selected by someone, we know not who, to comply with such a racial assignment, on what basis will the selection be made? How will the wishes of some be respected and others rejected, solely because they happen to be of the Negro race? We are not freeing these children of racial chains. We are compounding and prolonging the difficulty.

The true answer remains, give him absolute freedom of choice and see to it that he gets that choice in absolute good faith.

In conclusion, I wish to say that in my own case a burning desire to obtain an education in the face of impossible circumstances is not a theoretical experience encountered only by others. I did not have an

opportunity to attend school until I was eight years of age. The delay was quite unavoidable; there simply was no school to attend at that particular time. My mother taught me how to read and write, to add and subtract. My total sympathies are with the cause of education freely available to all. This, of course, under the Constitution requires no special privileges for any group or segment of the population. I regret that where once the concern was for schools to attend we now have so much strife about the details of utilizing those so readily available.

What I have said herein is with the greatest deference for my Brethren who think otherwise. We must and shall continue to work together according to our individual judgments of the law. The en banc decision may portend more problems ahead than we have heretofore encountered.

I concur in the reversal of the Judgments below, but my views of the issues generally are as herein set forth.

GODBOLD, Circuit Judge, dissenting:

I respectfully dissent. I wish not to delay appellate procedures if any of the parties desire to pursue them. Therefore, I am recording my dissent at this time and will file a dissenting opinion at a later date.

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CORRECTED COPY

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23345

UNITED STATES OF AMERICA and LINDA STOUT,
by her father and next friend, BLEVIN STOUT,
Appellants,

versus

JEFFERSON COUNTY BOARD OF EDUCATION,
ET AL,
Appellees.

No. 23331

UNITED STATES OF AMERICA,
Appellant,

versus

THE BOARD OF EDUCATION OF THE CITY OF
FAIRFIELD, ET AL,
Appellees.

No. 23335

UNITED STATES OF AMERICA,
Appellant,

versus

THE BOARD OF EDUCATION OF THE CITY OF BESSEMER, ET AL,
Appellees.

Appeals from the United States District Court for the Northern District of Alabama.

No. 23274

UNITED STATES OF AMERICA,
Appellant,

versus

CADDO PARISH SCHOOL BOARD, ET AL,
Appellees.

No. 23365

UNITED STATES OF AMERICA,
Appellant,

versus

THE BOSSIER PARISH SCHOOL BOARD, ET AL,
Appellees.

No. 23173

MARGARET M. JOHNSON, ET AL,
Appellants,

versus

JACKSON PARISH SCHOOL BOARD, ET AL,
Appellees.

No. 23192

YVORNIA DECAROL BANKS, ET AL,
Appellants,

versus

CLAIBORNE PARISH SCHOOL BOARD, ET AL,
Appellees.

Appeals from the United States District Court for the Western District of Louisiana.

(December 29, 1966.)

Before WISDOM and THORNBERRY, Circuit Judges, and COX,* District Judge.

WISDOM, Circuit Judge: Once again the Court is called upon to review school desegregation plans to determine whether the plans meet constitutional standards. The distinctive feature of these cases, consolidated on appeal, is that they require us to reexamine school desegregation standards in the light of

* William Harold Cox, U. S. District Judge for the Southern District of Mississippi, sitting by designation.

the Civil Rights Act of 1964 and the Guidelines of the United States Office of Education, Department of Health, Education, and Welfare (HEW).

When the United States Supreme Court in 1954 decided *Brown v. Board of Education*[1] the members of the High School Class of 1966 had not entered the first grade. *Brown I* held that separate schools for Negro children were "inherently unequal".[2] Negro children, said the Court, have the "personal and present" right to equal educational opportunities with white children in a racially nondiscriminatory public school system. For all but a handful of Negro members of the High School Class of '66 this right has been "of such stuff as dreams are made on".[3]

"The *Brown* case is misread and misapplied when it is construed simply to confer upon Negro pupils the right to be considered for admission to a white

[1] Brown v. Board of Education, 1954, 347 U. S. 483, 74 S.Ct. 686, 98 L. Ed. 873 (*Brown I*). See Brown v. Board of Education, 1955, 349 U.S. 294, 75 S.Ct. 293, 99 L.Ed. 1083 (*Brown II*).

[2] 347 U. S. at 495.

[3] Shakespeare, The Temptest IV, The cases consolidated for appeal involve Alabama and Louisiana public schools. In Alabama, as of December 1965, there were 1250 Negro pupils, out of a statewide total of 295,848, actually enrolled in schools with 559,123 white students, 0.43% of the eligible Negro enrollment. In Louisiana there were 2187 Negro children, out of a total of 318,651, enrolled in school with 483,941 white children, 0.69% of the total eligible. Southern Education Reporting Service, Statistical Summary of Segregation-Desegregation in the Southern and Border Area from 1954 to the present, 15th Rev. p. 2, Dec. 1965. See Appendix B, Rate of Change and Status of Desegregation. In each of the seven cases before this Court, no start was made toward desegregation of the schools until 1965, eleven years after *Brown*. In all these cases, the start was a consequence of a court order obtained only after vigorous oppoaition by school officials.

school".[4] The United States Constitution, as construed in *Brown*, requires public school systems to integrate students, faculties, facilities, and activities.[5] If *Brown*

[4] Braxton v. Board of Public Instruction of Duval County, S.D.Fla. 1962, 7 Race Rel. L. Rep. 675, *aff'd*, 5 Cir. 1964, 326 F.2d 616, *cert. den'd* 377 U. S. 924 (1964). Senator Humphrey cited this case in explaining Section 604 of The Civil Rights Act of 1964. See Section IV D of this opinion.

[5] The mystique that has developed over the supposed difference between "desegregation" and "integration" originated in Briggs v. Elliott, E.D.S.C. 1955, 132 F.Supp. 776: "The Constitution . . . does not require integration. It merely forbids segregation". 132 F.Supp. at 777. This dictum is a product of the narrow view that Fourteenth Amendment rights are only individual rights; that therefore Negro school children individually must exhaust their administrative remedies and will not be allowed to bring class action suits to desegregate a school system. See Section IIIA of this opinion.

The Supreme Court did not use either "desegregation" or "integration" in *Brown*. But the Court did quote with approval a statement of the district court in which "integrated" was used as we use it here. For ten years after *Brown* the Court carefully refrained from using "integration" or "integrated". Then in 1964 in Griffin v. County School Board of Prince Edward County, 375 U.S. 391, 84 S.Ct. 400, 11 L.Ed.2d 409, the Court noted that "the Board of Supervisors decided not to levy taxes or appropriate funds for *integrated* public schools", i.e. schools under a desegregation order. There is not one Supreme Court decision which can be fairly construed to show that the Court distinguished "desegregation" from "integration", in terms or by even the most gossamer implication.

Counsel for the Alabama defendants assert that "desegregation" and "integration" are terms of art. They struggle valiantly to define these words:

> By "desegregation" we mean the duty imposed by *Brown* upon schools which previously compelled segregation to take affirmative steps to eliminate such *compulsory segregation* so as to *allow* the *admission* of students to schools on a non-racial admission basis. By "integration" we mean the actual placing of or attendance by Negro students in schools with whites.

They can do so only by narrowing the definitions to the point of inadequacy. Manifestly, the duty to desegregate schools extends beyond the mere "admission" of Negro students on a non-racial basis. As for "integration", manifestly a desegregation plan must include some arrangement for the attendance of Negroes in formerly white schools.

In this opinion we use the words "integration" and "desegregation" interchangeably. That is the way they are used in the vernacular. That is the way they are defined in Webster's Third New International Dictionary: "'integrate' to 'desegregate'".

I left any doubt as to the affirmative duty of states to furnish a fully integrated education to Negroes as

The Civil Rights Commission follows this usage: for example, "The Office of Education . . . standards . . . should . . . ensure that free choice plans are adequate to disestablish dual, racially segregated school systems . . . to achieve substantial integration in such systems." U. S. Comm. Survey of School Desegregation 1965-66, p. 54.

The Eighth Circuit used "integration" interchangeably with "desegregation" in Smith v. Board of Education of Morrilton, 8 Cir. 1966, 365 F.2d 770. So did the Third Circuit in Evans v. Ennis, 3 Cir. 1960, 281 F.2d 385. See also Brown v. County School Board of Frederick County, Va., W.D.Va. 1965, 245 F. Supp. 549. The courts in Dowell v. School Board of Oklahoma City Public Schools, W.D.Okla. 1965, 244 F. Supp. 971 and Dove v. Parham, 8 Cir. 1960, 282 F.2d 256 (and the Civil Rights Commission), speak of a school board's duty to "*disestablish* segregation". This term accurately "implies that existing racial imbalance is a consequence of past segregation policies, and, because of this, school boards *have an affirmative duty to remedy racial imbalance*". Note, Discrimination in the Hiring and Assignment of Teachers in Public School Systems, 64 Mich. L. Rev. 692, 698 n.44 (1966). (Emphasis added.)

We use the terms "integration" and "desegregation" of formerly segregated public schools to mean the conversion of a de jure segregated dual system to a unitary, nonracial (nondiscriminatory) system—lock, stock, and barrel: students, faculty, staff, facilities, programs, and activities. The proper governmental objective of the conversion is to offer educational opportunities on equal terms to all.

As we see it, the law imposes an absolute duty to desegregate, that is, disestablish segregation. And an absolute duty to integrate, in the sense that a disproportionate concentration of Negroes in certain schools cannot be ignored; racial mixing of students is a high priority educational goal. The law does not require a maximum of racial mixing or striking a racial balance accurately reflecting the racial composition of the community or the school population. It does not require that each and every child shall attend a racially balanced school. This, we take it, is the sense in which the Civil Rights Commission used the phrase "substantial-integration".

As long as school boards understand the objective of desegregation and the necessity for complete disestablishment of segregation by converting the dual system to a nonracial unitary system, the nomenclature is unimportant. The criterion for determining the validity of a provision in a desegregation plan is whether it is reasonably related to the objective. We emphasize, therefore, the governmental objective and the specifics of the conversion process, rather than the imagery evoked by the pejorative "integration". Decision-making in this important area of the law cannot be made to turn upon a quibble devised over

a class, *Brown II* resolved that doubt. A state with a dual attendance system, one for whites and one for Negroes, must "effectuate a transition to a [single] racially nondiscriminatory system."[6] The two *Brown* decisions established equalization of educational opportunities as a high priority goal for all of the states and compelled seventeen states, which by law had segregated public schools, to take affirmative action to reorganize their schools into a unitary, nonracial system.

The only school desegregation plan that meets constitutional standards is one that works. By helping public schools to meet that test, by assisting the courts in their independent evaluation of school desegregation plans, and by accelerating the progress but simplifying the process of desegregation the HEW Guidelines offer new hope to Negro school children long denied their constitutional rights. A national effort, bringing together Congress, the executive, and the judiciary may be able to make meaningful the right of Negro children to equal educational opportunities. The courts acting alone have failed.

We hold, again, in determining whether school desegregation plans meet the standards of *Brown* and

ten years ago by a court that misread *Brown*, misapplied the class action doctrine in the school desegregation cases, and did not foresee the development of the law of equal opportunities.

[6] Brown v. Board of Education, 1955, 349 U.S. 294, 301.

other decisions of the Supreme Court,[7] that courts in this circuit should give "great weight" to HEW Guidelines.[8] Such deference is consistent with the exercise of traditional judicial powers and functions. HEW Guidelines are based on decisions of this and other courts, are formulated to stay within the scope of the Civil Rights Act of 1964, are prepared in detail by experts in education and school administration, and are intended by Congress and the executive to be part of a coordinated national program. The Guidelines present the best system available for uniform application, and the best aid to the courts in evaluating the validity of a school desegregation plan and the progress made under that plan.

HEW regulations provide that schools applying for financial assistance must comply with certain requirements. However, the requirements for elementary or secondary schools "shall be deemed to be satisfied if such school or school system is subject to a final order of a court of the United States for the desegregation of such school or school system . . ."[9] This regulation causes our decisions to have a two-fold impact on school desegregation. Our decisions determine not only (1) the standards schools must comply with under *Brown* but also (2) the standards these schools must comply with to qualify for federal financial assistance. Schools automatically qual-

[7] Especially Cooper v. Aaron, 1958, 358 U.S. 1, 78 S.Ct. 1399, 3 L.Ed.2d 3; Bradley v. School Board of the City of Richmond, 1965, 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187; Rogers v. Paul, 1965, 382 U.S. 198, 86 S.Ct. 358, 15 L.Ed.2d 265.

[8] Singleton v. Jackson Municipal Separate School District, 5 Cir. 1965, 348 F.2d 729 (*Singleton I*).

[9] 45 C.F.R. §80.4(c) (1964).

ify for federal aid whenever a final court order desegregating the school has been entered in the litigation and the school authorities agree to comply with the order. Because of the second consequence of our decisions and because of our duty to cooperate with Congress and with the executive in enforcing Congressional objectives, strong policy considerations support our holding that the standards of court-supervised desegregation should not be lower than the standards of HEW-supervised desegregation. The Guidelines, of course, cannot bind the courts; we are not abdicating any judicial responsibilities.[10] But we hold that HEW's standards are substantially the same as this Court's standards. They are required by the Constitution and, as we construe them, are within the scope of the Civil Rights Act of 1964. In evaluating desegregation plans, district courts should make few exceptions to the Guidelines and should carefully tailor those so as not to defeat the policies of HEW or the holding of this Court.

Case by case over the last twelve years, courts have increased their understanding of the desegregation process.[11] Less and less have courts accepted the question-begging distinction between "desegregation" and "integration" as a sanctuary for school boards fleeing from their constitutional duty to estab-

[10] In *Singleton I*, to avoid any such inference, we said: "The judiciary has of course functions and duties distinct from those of the executive department . . . Absent legal questions, the United States Office of Education is better qualified. . . ." 348 F. 2d at 731.

[11] "The rule has become: the later the start, the shorter the time allowed for transition." Lockett v. Board of Education of Muscogee County, 5 Cir. 1965, 342 F.2d 225, 228.

lish an integrated, non-racial school system.[12] With the benefit of this experience, the Court has restudied the School Segregation Cases. We have reexamined the nature of the Negro's right to equal educational opportunities and the extent of the correlative affirmative duty of the state to furnish equal educational opportunities. We have taken a close look at the background and objectives of the Civil Rights Act of 1964.[13]

* * *

We approach decision-making here with humility. Many intelligent men of good will who have dedicated their lives to public education are deeply concerned for fear that a doctrinaire approach to desegregating schools may lower educational standards or even destroy public schools in some areas. These educators and school administrators, especially in communities where total segregation has been the way of life from cradle to coffin, may fail to understand all of the legal implications of *Brown*, but they understand the grim realities of the problems that complicate their task.

The Court is aware of the gravity of their problems. (1) Some determined opponents of desegregation would scuttle public education rather than send their children to schools with Negro children. These men

[12] See Section III A and footnote 5.

[13] The Court asked counsel in these consolidated cases and in five other cases for briefs on the following questions:

(a) To what extent, consistent with judicial prerogatives and obligations, statutory and constitutional, is it permissible and desirable for a federal court (trial or appellate) to give weight to or to rely on H.E.W. guidelines and policies in cases before the court?

(b) If permissible and desirable, what practical means and methods do you suggest that federal courts (trial and appellate) should follow in making H.E.W. guidelines and policies judicially effective?

flee to the suburbs, reinforcing urban neighborhood school patterns. (2) Private schools, aided by state grants, have mushroomed in some states in this circuit.[14] The flight of white children to these new schools and to established private and parochial schools promotes resegregation. (3) Many white teachers prefer not to teach in Negro schools. They are tempted to seek employment at white schools or to retire. (4) Many Negro children, for various reasons, prefer to finish school where they started. (5) The gap between white and Negro scholastic achievements causes all sorts of difficulties. There is no consolation in the fact that the gap depends on the socio-economic status of Negroes at least as much as it depends on inferior Negro schools.

No court can have a confident solution for a legal problem so closely interwoven with political, social, and moral threads as the problem of establishing fair, workable standards for undoing de jure school segregation in the South. The Civil Rights Act of 1964 and the HEW Guidelines are belated but invaluable helps in arriving at a neutral, principled deci-

[14] Alabama provides tuition grants of $185 a year and Louisiana $360 a year to students attending private schools. "Only Florida and Texas report no obvious cases of private schools formed to avoid desegregation in public schools." Up to the school year 1965-66, Louisiana had "some 11,000 pupils already receiving state tuition grants to attend private schools." This number will be significantly increased as a result of new private schools in Plaquemines Parish. Leeson, Private Schools Continue to Increase in the South, Southern Education Report, November 1966, p. 23. In Louisiana, students attending parochial schools do not receive tuition grants.

sion consistent with the dimensions of the problem, traditional judicial functions, and the United States Constitution. We grasp the nettle.

I.

"No army is stronger than an idea whose time has come."[15] Ten years after *Brown*, came the Civil Rights Act of 1964.[16] Congress decided that the time had come for a sweeping civil rights advance, including national legislation to speed up desegregation of public schools and to put teeth into enforcement of desegregation.[17] Titles IV and VI together

[15] In a press meeting May 19, 1964, to discuss the Civil Rights bill, Senator Everett Dirksen so paraphrased, "On résiste à l'invasion des armées; on ne résiste pas à l'invasion des idées." Victor Hugo, Histoire d'un crime: Conclusion: La Chute, Ch. 10 (1877). Senator Dirksen then said, "Let editors rave at will and let states fulminate at will, but the time has come, and it can't be stopped." Cong. Quarterly Service, Revolution in Civil Rights 63 (1965).

[16] H. R. 7152, Pub. L. 88-352, 78 Stat. 243; approved July 2, 1964.

[17] "[I]n the last decade it has become increasingly clear that progress has been too slow and that national legislation is required to meet a national need which becomes ever more obvious. That need is evidenced, on the one hand, by a growing impatience by the victims of discrimination with its continuance and, on the other hand, by a growing recognition on the part of all of our people of the incompatibility of such discrimination with our ideals and the principles to which this country is dedicated. A number of provisions of the Constitution of the United States clearly supply the means 'to secure these rights,' and H. R. 7152, as amended, resting upon this authority, is designed as a step toward eradicating significant areas of discrimination on a nationwide basis. It is general in application and national in scope." House Judiciary Committee Report No. 914, to Accompany H. R. 7152. 2 U.S. Code Congressional and Administrative News, 88th Cong. 2nd Sess. 1964, 2933. "The transition from all-Negro to integrated schools is at best a difficult problem of adjustment for teachers and students alike. . . . We have tried to point out that the progress in school desegregation so well commenced in the period 1954-57 has been grinding to a halt. The trend observed in 1957-59 toward desegregation by court order

constitute the congressional alternative to court-supervised desegregation. These sections of the law mobilize in aid of desegregation the United States Office of Education and the Nation's purse.

A. Title IV authorizes the Office of Education to give technical and financial assistance to local school systems in the process of desegregation.[18] Title VI requires all federal agencies administering any grant-in-aid program to see to it that there is no racial discrimination by any school or other recipient of federal financial aid.[19] School boards cannot, however, by giving up federal aid, avoid the policy that produced this limitation on federal aid to schools: Title IV authorizes the Attorney General to sue, in the name of the United States, to desegregate a public

rather than by voluntary action has continued. It is not healthy nor right in this country to require the local residents of a community to carry the sole burden and face alone the hazards of commencing costly litigation to compel school desegregation. After all, it is the responsibility of the Federal Government to protect constitutional rights. . . ." Additional Views on H. R. 7152 of Hon. William M. McCulloch, Hon. John V. Lindsay, Hon. William T. Cahill, Hon. Garner E. Shriver, Hon. Clark MacGregor, Hon. Charles McC. Mathias, Hon. James E. Bromwell." Ibid., 2487.

[18] 78 Stat. 246-99, 42 U.S.C. § 2000c (1964).

[19] 78 Stat. 252-53, 42 U.S.C. § 2000d (1964). Section 601 states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Section 602 states: "Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of Section 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. . . ."

school or school system.[20] More clearly and effectively than either of the other two coordinate branches of Government, Congress speaks as the Voice of the Nation. *The national policy is plain: formerly de jure segregated public school systems based on dual attendance zones must shift to unitary, nonracial systems—with or without federal funds.*

The Chief Executive acted promptly to carry into effect the Chief Legislature's mandate. President Lyndon B. Johnson signed the bill into law July 2, 1964, only a few hours after Congress had finally approved it. In the signing ceremony broadcast to the Nation, the President said: "We believe all men are entitled to the blessings of liberty, yet millions are being deprived of those blessings—not because of their own failures, but because of the color of their skins. . . . [It] cannot continue."[21] At the request of President Johnson, Vice President Hubert H. Humphrey submitted a report to the President "On the Coordination of Civil Rights Activities in the Federal Government" recommending the creation of a Council on Equal Opportunity. The report concludes that "the very breadth of the Federal Government's effort, involving a multiplicity of programs" necessary to carry out the 1964 Act had created a "problem of coordination." The President approved the recommendation that instead of creating a new agency

[20] 78 Stat. 246-49, 42 U.S.C. § 2000c (1964). In addition, Title IX authorizes the Attorney General to intervene in private suits where persons have alleged denial of equal protection of the laws under the 14th Amendment where he certifies that the case is of "general public importance." 78 Stat. 266, Title IX § 902, 42 U.S.C. § 2000 h-2 (1964).

[21] N.Y. Times, July 3, 1964, p. 1.

there be a general coordination of effort.[22] Later, the President noted that the federal departments and agencies had "adopted uniform and consistent regulations implementing Title VI . . . [in] a coordinated program of enforcement." He directed the Attorney General to "coordinate" the various federal programs in the adoption of "consistent and uniform policies, practices and procedures with respect to the enforcement of Title VI. . . ."[23]

In April 1965 Congress for the first time in its history adopted a law providing general federal aid —a billion dollars a year—for elementary and secondary schools.[24] It is a fair assumption that Congress would not have taken this step had Title VI not established the principle that schools receiving federal assistance must meet uniform national standards for desegregation.[25]

To make Title VI effective, the Department of Health, Education, and Welfare (HEW) adopted the regulation, "Non-discrimination in Federally assisted Programs."[26] This regulation directs the Commissioner of Education to approve applications for fi-

[22] Executive Order 11197, Feb. 9, 1965, 30 F.R. 1721.
[23] Executive Order No. 11247, Sept. 28, 1965, 30 F. R. 12327.
[24] The Elementary and Secondary Education Act of 1965, 79 Stat. 27.
[25] "The Elementary and Secondary Education Act of 1965 greatly increased the amount of federal money available for public schools, and did so in accordance with a formula that pumps the lion's share of the money to low-income areas such as the Deep South. Consequently, Title VI of the Civil Rights Act of 1964 has become the main instrument for accelerating and completing the desegregation of Southern public schools." The New Republic, April 9, 1966 (Professor Alexander M. Bickel).
[26] 45 C.F.R. Part 80, Dec. 4, 1964, 64 F. R. 12539.

nancial assistance to public schools only if the school or school system agrees to comply with a court order, if any, outstanding against it, or submits a desegregation plan satisfactory to the Commissioner.[27]

To make the regulation effective, by assisting the Office of Education in determining whether a school qualifies for federal financial aid and by informing school boards of HEW requirements, HEW formulated certain standards or guidelines. In April 1965, nearly a year after the Act was signed, HEW published its first *Guidelines*, "General Statement of Policies under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools."[28] These *Guidelines* fixed the fall of 1967 as the target date for total desegregation of all grades. In March 1966 HEW issued "*Revised Guidelines*" to correct most of the major flaws revealed in the first year of operation under Title VI.[29]

B. The HEW Guidelines raise the question: To what extent should a court, in determining whether to approve a school desegregation plan, give weight to the HEW Guidelines? We adhere to the answer

[27] "Every application for Federal financial assistance to carry out a program to which this part applies . . . shall, as a condition to its approval . . ., contain or be accompanied by an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part. . . ." 45 C.F.R. § 80.4 (a) (1964).

[28] U. S. Department of Health, Education and Welfare, Office of Education, General Statement of Policies under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools, April, 1965. It is quoted in full in Price v. Denison Independent School District, 5 Cir. 1965, 348 F.2d at 1010.

[29] Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964. March, 1966.

this Court gave in four earlier cases. The HEW Guidelines are "minimum standards", representing for the most part standards the Supreme Court and this Court established *before the Guidelines were promulgated.*[30] Again we hold, "we attach great weight" to the *Guidelines. Singleton v. Jackson Municipal Separate School District,* 5 Cir. 1965, 348 F.2d 729 (*Singleton I*). "We put these standards to work. . . . [Plans] should be modeled after the Commissioner of Education's requirements. . . . [Exceptions to the guidelines should be] confined to those rare cases presenting justiciable, not operational, questions. . . . The applicable standard is essentially the HEW formulae." *Price v. Denison Independent School District,* 5 Cir. 1965, 348 F.2d 1010. "We consider it to be in the best interest of all concerned that School Boards meet the minimum standards of the Office of Education . . . . . In certain school districts and in certain respects, HEW standards may be too low to meet the requirements established by the Supreme Court and by this Court . . . . [But we also] consider it important to make clear that . . . we do not abdicate our judicial responsibility for determining whether a school desegregation plan violates federally guaranteed rights." *Singleton v. Jackson Municipal Separate School District,* 5 Cir. 1966, 355 F.2d 815 *(Singleton II).* In *Davis v. Board of School Commissioners of Mobile County,* 5 Cir. 1966, 364 F.2d 896, the most recent school case before this Court, we ap-

[30] In Davis v. Board of School Commissioners of Mobile County, 5 Cir. 1966, 364 F.2d 896, Judge Tuttle, for the Court, noted that "for more than a year, it has been apparent to all concerned that the requirements of Singleton and Denison were the minimum standards to apply."

proved *Singleton I* and *II* and *Price v. Denison* and ordered certain changes in the school plan in conformity with the HEW Guidelines.

Courts in other circuits are in substantial agreement with this Court. In *Kemp v. Beasley*, 8 Cir. 1965, 352 F. 2d 14, 18-19, the Court said: "The Court agrees that these [HEW] standards must be *heavily relied upon* . . . . [T]he courts should endeavor to model their standards after those promulgated by the executive. They are not bound, however, and when circumstances dictate, the courts may require something more, less or different from the H.E.W. guidelines." (Emphasis added.) Concurring, Judge Larson observed: "However, that 'something different' should rarely, if ever be less than what is contemplated by the H.E.W. standards." 352 F.2d at 23. *Smith v. Board of Education of Morrilton*, 8 Cir. 1966, 365 F.2d 770 reaffirms that the Guidelines "are entitled to serious judicial deference".

Although the Court of Appeals for the Fourth Circuit has not yet considered the effect of the HEW standards, district courts in that circuit have relied on the guidelines. See *Kier v. County School Board of Augusta County*, W.D.Va. 1966, 249 F. Supp. 239; *Wright v. County School Board of Greenville County*, E.D.Va. 1966, 252 F. Supp. 378; *Miller v. Clarendon County School District No. 2*, D.S.C., Civil Action No. 8752, April 21, 1966. In *Miller*, one of the most recent of these cases, the court said:

> The orderly progress of desegregation is best served if school systems desegregating

> under court order are required to meet the minimum standards promulgated for systems that desegregate voluntarily. Without directing absolute adherence to the "Revised Standards" guidelines at this juncture, this court will welcome their inclusion in any new, amended, or substitute plan which may be adopted and submitted.

In this circuit, the school problem arises from state action. This Court has not had to deal with nonracially motivated de facto segregation, that is, racial imbalance resulting fortuitously in a school system based on a single neighborhood school serving all white and Negro children in a certain attendance area or neighborhood. For this circuit, the HEW Guidelines offer, for the first time, the prospect that the transition from a de jure segregated dual system to a unitary integrated system may be carried out effectively, promptly, and in an orderly manner. See Appendix B, Rate of Change and Status of Desegregation.

II.

We read Title VI as a congressional mandate for change—change in pace and method of enforcing desegregation. The 1964 Act does not disavow court-supervised desegregation. On the contrary, Congress recognized that to the courts belongs the last word in any case or controversy.[31] But Congress was dis-

[31] Title IV, § 407, 42 U.S.C. § 2000 (c) authorizing the Attorney General to bring suit, on receipt of a written complaint, would seem to imply this conclusion. Section 409 preserves the right of individual citizens "to sue for or obtain relief" against discrimination in public education. HEW Regulations provide: "In any case in which a final order of a court of the United States for

satisfied with the slow progress inherent in the judicial adversary process.[32] Congress therefore fashioned a new method of enforcement to be administered not on a case by case basis as in the courts but, generally, by federal agencies operating on a national scale and having a special competence in their respective fields. Congress looked to these agencies to shoulder the additional enforcement burdens resulting from the shift to high gear in school desegregation.

A. Congress was well aware that it was time for a change. In the decade following *Brown*, court-supervised desegregation made qualitative progress: Responsible Southern leaders accepted desegregation as a settled constitutional principle.[33] Quantitively,

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the desegregation of such school or school system is entered after submission of such a plan, such a plan shall be revised to conform to such final order, including any future modification of such order." 45 C.F.R. § 80.4(c) (1964).

[32] See footnote 17.

[33] "The Federal courts have been responsible for great qualitative advances in civil rights; the lack has been in quantitative implementation—in enabling the individual to avail himself of these great decisions." Bernhard and Natalie, Between Rights and Remedies, 53 Georgetown L. Jour. 915, 916 (1965). "[I]t is the consensus of the judges on the firing line, so to speak, that one phase in the administration of the law—the establishment phase, characterized by permissive tokenism, by a sort of minimal judicial holding of the line while the political process did, as it must, the main job of establishing—this phase has been closed out." Bickel, The Decade of School Desegregation, 64 Colum. L. Rev. 193, 209 (1964). The changes of the past decade have disappointed the most optimistic hopes, but they have been dramatically sweeping nonetheless. Gellhorn, A Decade of Desegregation—Retrospect and Prospect, 9 Utah L. Rev. 3 (1964). "What makes one uneasy, of course is the truly awesome magnitude of what has yet to be done." Marshall, *The Courts*, in Center for the Study of Democratic Institutions, The Maze of Modern Government 36 (1964), quoted in Pollak, Ten Years After the Decision, 24 Fed. Bar Jour. 123 (1964). On the first decade of desegregation, see generally, Sarratt, The Ordeal of Desegregation (1966); Legal Aspects of the Civil Rights Movement (D. B. King ed. 1965).

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the results were meagre. The statistics speak eloquently. See Appendix B, Rate of Change and Status of Desegregation. In 1965 the public school districts in the consolidated cases now before this Court had a school population of 155,782 school children, 59,361 of whom were Negro. Yet under the existing court-approved desegregation plans, only 110 Negro children in these districts, .019 per cent of the school population, attend former "white" schools.[34] In 1965 there was no faculty desegregation in any of these school districts; indeed, none of the 30,500 Negro teachers in Alabama, Louisiana, and Mississippi served with any of the 65,400 white teachers in those states.[35] In the 1963-64 school year, the eleven states of the Confederacy had 1.17 per cent of their Negro students in schools with white students.[36] In 1964-65, undoubtedly because of the effect of the 1964 Act,

[34]

	Total Enrollment		Negroes Admitted To Formerly White Schools
	W	N	
Bessemer, Ala.	2,920	5,284	13
Fairfield, Ala.	1,779	2,159	31
Jefferson County, Ala.	45,000	18,000	24
Caddo Parish, La.	30,680	24,467	1
Bossier Parish, La.	11,100	4,400	31
Jackson Parish, La.	2,548	1,609	5
Claiborne Parish, La.	2,394	3,442	5

(Affidavit of St. John Barrett, Attorney, Department of Justice, attached to Motion to Consolidate and Expedite Appeals.)

[35] U. S. Dept. of Health, Education and Welfare, Office of Education Release, Table 3, September 27, 1965. In the 11 states of the Confederacy there are 1800 Negro teachers, 1.8 per cent of all the Negro teachers in Southern schools, assigned to schools with biracial faculties. By contrast, in the border states (Delaware, Kentucky, Maryland, Missouri, Oklahoma, and West Virginia) 91 per cent of the Negro teachers now teach white students. Ibid.

[36] Southern Education Reporting Service, Statistical Summary, Dec. 1965, cited in U.S. Comm. on Civil Rights, Survey of School Desegregation in the Southern and Border States 1965-66, p. 1.

the percentage doubled, reaching 2.25. For the 1965-66 school year, this time because of HEW Guidelines, the percentage reached 6.01 per cent. In 1965-66 the entire region encompassing the Southern *and border states* had 10.9 per cent of their Negro children in school with white children; 1,555 biracial school districts out of 3,031 in the Southern and border states were still fully segregated; 3,101,043 Negro children in the region attended all-Negro schools. Despite the impetus of the 1964 Act, the states of Alabama, Louisiana, and Mississippi, still had less than one per cent of their Negro enrollment attending schools with white students.[37]

The dead hand of the old past and the closed fist of the recent past account for some of the slow progress. There are other reasons—as obvious to Congress as to courts. (1) Local loyalties compelled school officials and elected officials to make a public record of their unwillingness to act. But even school authorities willing to act have moved slowly because of uncertainty as to the scope of their duty to act affirmatively. This is attributable to (a) a misplaced reliance on the *Briggs* dictum that the Constitution "does not require integration",[38] (b) a misunderstanding of the *Brown II* mandate, desegregate with "due deliberate speed",[39] and (c) a mistaken no-

[37] *Ibid.*; see footnote 3; Appendix B, Rate of Change and Status of Desegregation.

[38] See Section III A of this opinion.

[39] In Davis v. Board of School Commissioners of Mobile County, 5 Cir. 1966, 364 F.2d 896, 898, Judge Tuttle, for the Court, said: "This is the fourth appearance of this case before this court. This present appeal, coming as it does from an order of the trial court entered nearly eighteen months ago, on March 31, 1965, points up, among other things, the utter impracticability of a

tion that transfers under the Pupil Placement Laws satisfy desegregation requirements." (2) Case by case development of the law is a poor sort of medium for reasonably prompt and uniform desegregation. There are natural limits to effective legal action. Courts cannot give advisory opinions, and the disciplined exercise of the judicial function properly makes courts reluctant to move forward in an area of the

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continued exercise by the courts of the responsibility for supervising the manner in which segregated school systems break out of the policy of complete segregation into gradual steps of compliance and towards complete compliance with the constitutional requirements of Brown v. Board of Education, 347 U.S. 483. One of the reasons for the impracticability of this method of overseeing the transitional stages of operations of the school boards involved is that, under the Supreme Court's 'deliberate speed' provisions, it has been the duty of the appellate courts to interpret and reinterpret this language as time has grown apace, it now being the twelfth school year since the Supreme Court's decision."

" "The pupil assignment acts have been the principal obstacle to desegregation in the South." U. S. Comm. on Civil Rights, Civil Rights U.S.A.—Public Schools, Southern States 15, 1962. See Note, The Federal Courts and Integration of Southern Schools: Troubled Status of the Pupil Placement Acts, 62 Colum. L. Rev. 1448, 1471-73 (1962); Bush v. Orleans Parish School Board, 5 Cir. 1962, 308 F.2d 491. Such laws allow carefully screened Negro children, *on their application*, to transfer to white schools from the segregated schools to which the Negroes were initially unconstitutionally assigned. Often, even after six to eight years of no desegregation, these transfers were limited to a grade a year. When this law first came before us we held it to be unconstitutional. Bush v. Orleans Parish School Board, E.D.La. 1956, 138 F. Supp. 337, *aff'd* 242 F.2d 156, *cert. den'd* 354 U.S. 921 (1957). Later, in a narrowly focused opinion, we held that the Alabama version was constitutional *on its face*. Shuttlesworth v. Birmingham Board of Education, N.D.Ala. 1958, 162 F.Supp. 372, aff'd per curiam, 358 U.S. 101 (1958). As long ago as 1959 and 1960 this Court disapproved of such acts as a reasonable start toward full compliance. Gibson v. Board of Public Instruction of Dade County, 272 F.2d 763; Mannings v. Board of Public Instruction of Hillsborough County, 277 F.2d 370. See also Bush v. Orleans Parish School Board, 5 Cir. 1961, 308 F.2d 491; Evers v. Jackson Municipal Separate School District, 5 Cir. 1964, 328 F.2d 408. "[T]he entire public knows that in fact [the Louisiana law] . . . is being used to maintain segregation. . . . It is not a plan for desegregation at all." Bush v. Orleans Parish School Board, 308 F. 2d at 499-500.

law bordering the periphery of the judicial domain. (3) The contempt power is ill-suited to serve as the chief means of enforcing desegregation. Judges naturally shrink from using it against citizens willing to accept the thankless, painful responsibility of serving on a school board.[41] (4) School desegregation plans are often woefully inadequate; they rarely provide necessary detailed instructions and specific answers to administrative problems.[42] And most judges do not have sufficient competence—they are not educators or school administrators—to know the right questions, much less the right answers. (5) But one reason more than any other has held back desegregation of public schools on a large scale. This has been the lack, until 1964, of effective congressional

[41] Bush v. Orleans Parish School Board is an example. The board was plagued by bundles of Louisiana statutes aimed at defeating desegregation. There were five extra sessions of the Louisiana legislature in 1960. After the School Board had for three years failed to comply with an order to submit a plan, the district judge wrote one himself. The trial judge simply said: "All children [entering New Orleans public schools . . . . may attend either the formerly all white public schools nearest their homes, or the formerly all Negro public schools nearest their homes, at their option. B. Children may be transferred from one school to another, provided such transfers are not based on race". 204 F.Supp. 568, 571-72.

[42] For example, the order of the able district judge in *Bush*. See footnote 41. Judge Bohanon underscored this point in Dowell v. School Board of Oklahoma City Public Schools, W.D.Okla. 1965, 244 F. Supp. 971, 976: "The plan submitted to this Court . . . . is not a plan, but a statement of policy. School desegregation is a difficult and complicated matter, and, as the record shows, cannot be accomplished by a statement of policy. 'Desegregation of public schools in a system as large as Oklahoma City requires a definite and positive plan providing definable and ascertainable goals to be achieved within a definite time according to a prepared procedure and with responsibilities clearly designated."

statutory recognition of school desegregation as the law of the land.[43]

"Considerable progress has been made . . . Nevertheless, in the last decade it has become increasingly clear that progress has been too slow and that national legislation is required to meet a national need which becomes ever more obvious."[44] Title VI of the Civil Rights Act of 1964, therefore, was not only appropriate and proper legislation under the Thirteenth and Fourteenth Amendments; it was necessary to

[43] The Civil Rights Act of 1964 had its direct genesis in President Kennedy's message to Congress of June 19, 1963, urging passage of an omnibus civil rights law. He noted: "In the continued absence of congressional action, too many state and local officials as well as businessmen will remain unwilling to accord these rights to all citizens. Some local courts and local merchants may well claim to be uncertain of the law, while those merchants who do recognize the justice of the Negro's request (and I believe these constitute the great majority of merchants, North and South) will be fearful of being the first to move, in the face of official customer, employee, or competitive pressures. Negroes, consequently, can be expected to continue increasingly to seek the vindication of these rights through organized direct action, with all its potentially explosive consequences, such as we have seen in Birmingham, in Philadelphia, in Jackson, in Boston, in Cambridge, Md., and in many other parts of the country. In short, the result of continued Federal legislative inaction will be continued, if not increased, racial strife—causing the leadership on both sides to pass from the hands of reasonable and responsible men to the purveyors of hate and violence, endangering domestic tranquillity, retarding our nation's economic and social progress and weakening the respect with which the rest of the world regards us. No American, I feel sure, would prefer this course of tension, disorder, and division—and the great majority of our citizens simply cannot accept it." H.Doc. 124, 88th Cong. 1st Sess. June 20, 1963, Rep. Emanuel Celler, Chairman of the House Judiciary Committee, introduced H.R. 7152 embodying the President's proposals. The same day Senator Mike Mansfield introduced a similar bill, S. 1731. H.R. 7152-S.1731, as amended, became the Civil Rights Act of 1964.

[44] H. Rep. No. 914, 88th Cong., 1st Sess.

rescue school desegregation from the bog in which it had been trapped for ten years.[45]

The Civil Rights Commission, doubtless better able than any other authority to understand the significance of the Civil Rights Act of 1964, had this to say about Title VI:

> "This statute heralded a new era in school desegregation . . . Most significantly . . . Federal power was to be brought to bear in a manner which promised speedier and more substantial desegregation than had been achieved through the voluntary efforts of school boards and district-by-district litigation. . . . During fiscal year 1964, $176,546,992 was distributed to State and local school agencies in the 17 Southern and border States. The passage of the Elementary and Secondary Education Act of 1965 added an additional appropriation of $589,946,135 for allocation to the 17 Southern and border States for fiscal year 1966. With funds of such magnitude at stake, most school systems would be placed at a serious disadvantage by termination of Federal assistance."[46]

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[45] "It was the Congressional purpose, in Title VI of the Civil Rights Act of 1964, to remove school desegregation efforts from the courts, where they had been bogged down for more than a decade. Unless the power of the Federal purse is more effectively utilized, resistance to national policy will continue and, in fact, will be reinforced." Report of the White House Conference "To Fulfill These Rights", June 1-2, 1966, p. 63.

[46] Rep. U. S. Comm. on Civil Rights, Survey of School Desegregation in the Southern and Border States—1965-66, p. 2.

B. The congressional mandate, as embodied in the Act and as carried out in the HEW Guidelines, does not conflict with the proper exercise of the judicial function or with the doctrine of separation of powers. It does however profoundly affect constructive use of the judicial function within the lawful scope of sound judicial discretion. When Congress declares national policy, the duty the two other coordinate branches owe to the Nation requires that, within the law, the judiciary and the executive respect and carry out that policy. Here the Chief Executive acted promptly to bring about uniform standards for desegregation. The judicial branch too should cooperate with Congress and the executive in making administrative agencies effective instruments for supervising and enforcing desegregation of public schools. Justice Harlan F. Stone expressed this well:

> "Legislatures create administrative agencies with the desire and expectation that they will perform efficiently the tasks committed to them. That, at least, is one of the contemplated social advantages to be weighed in resolving doubtful construction. Its aim is so obvious as to make unavoidable the conclusion that the function which courts are called upon to perform, in carrying into operation such administrative schemes, is constructive, not destructive, to make administrative agencies, whenever reasonably possible, effective

instruments for law enforcement, and not to destroy them."[47]

In an analogous situation involving enforcement of the Fair Labor Standards Act, the Supreme Court has said, "Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons." *Skidmore v. Swift & Co.*, 1944, 323 U. S. 134, 65 S.Ct. 161, 89 L.Ed. 124. In an appeal from the district court's denial of an injunction to enforce labor standards under the Act this Court has pointed out:

"... this proceeding is only superficially related to a suit in equity for an injunction to protect interests jeopardized in a private controversy. The public interest is jeopardized here. The injunctive processes are a means of effecting general compliance with national

[47] Stone, The Common Law in the United States, 50 Harv. L. Rev. 1, 18 (1936). In a similar vein, writing for the Court, Justice Stone has said: "... in construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through co-ordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim." United States v. Morgan, 1939, 307 U. S. 183, 191, 59 S. Ct. 795, 799, 83 L.Ed. 1211.

policy as expressed by Congress, a public policy judges too must carry out—actuated by the spirit of the law and not begrudgingly as if it were a newly imposed fiat of a presidium. . . . Implicit in the defendants' non-compliance, as we read the briefs and the record, is a certain underlying, not unnatural, Actonian distaste for national legislation affecting local activities. But the Fair Labor Standards Law has been on the books for twenty-three years. The Act establishes a policy for all of the country, and for the courts as well as for the agency required to administer the law. Mitchell v. Pidcock, 5 Cir. 1962, 299 F.2d 281, 287, 288.

C. We must therefore cooperate with Congress and the Executive in enforcing Title VI. The problem is: Are the HEW Guidelines within the scope of the congressional and executive policies embodied in the Civil Rights Act of 1964. We hold that they are.

The Guidelines do not purport to be a rule or regulation or order. They constitute a statement of policy under section 80.4(c) of the HEW Regulations issued after the President approved the regulations December 3, 1964. HEW is under no statutory compulsion to issue such statements. It is, however, of manifest advantage to school boards throughout the country and to the general public to know the criteria the Commissioner uses in determining whether a

school meets the requirements for eligibility to receive financial assistance.

The Guidelines have the vices of all administrative policies established unilaterally without a hearing. Because of these vices the courts, as the school boards point out, have set limits on administrative regulations, rulings, policies, and practices: an agency construction of a statute cannot make the law; it must conform to the law and be reasonable. To some extent the administrative weight of the declarations depends on the place of such declarations in the hierarchy of agency pronouncements extending from regulations down to general counsel memoranda and inter-office decisions. See *Manhattan General Electric Company v. Commissioner*, 1936, 297 U. S. 129, 56 S.Ct. 397, 80 L.Ed. 528; *United States v. Bennett*, 5 Cir. 1951, 186 F.2d 407; *United States v. Mississippi Chemical Corporation*, 5 Cir. 1964, 326 F. 2d 569; *Chattanooga Auto Club v. Commissioner*, 6 Cir. 1950, 182 F.2d 551.

These and similar decisions are not inconsistent with the courts' giving great weight to the HEW's policy statements on enforcement of Title VI. In *Skidmore v. Swift & Co.*, 323 U.S. 134, an action was commenced in a federal district court by employees of Swift & Co. to recover wages at the overtime rates prescribed by the Fair Labor Standards Act (52 Stat. 1060, et seq.) for certain services which they had performed. At issue was whether these services constituted "employment" within the meaning of sec-

tion 7 (a) of that act. The district court and this Court, on appeal, decided this issue against the plaintiffs. The Supreme Court reversed. After acknowledging (323 U.S. at 137) that the statute had granted no rule-making power to the Wage and Hour Administrator with respect to the issue at hand ("[i]nstead, it put this responsibility on the courts"), the Court referred to an "Interpretative Bulletin" issued by the Administrator containing his interpretation of the statutory phrase in question. The Supreme Court said:

> "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[48]

[48] The Supreme Court also stated in *Skidmore*, 323 U. S. at 139-40: "The rulings of this Administrator are not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact. They are not, of course, conclusive, even in the cases with which they directly deal, much less in those to which they apply only by analogy. They do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do. But the Administrator's policies are made in pursuance of official duty, based upon more specialized

The Supreme Court found that the lower courts had misunderstood their function vis-a-vis the Interpretative Bulletin and remanded the case. See also, *United States v. American Trucking Association*, 1940. 310 U. S. 543, 549; *Goldberg v. Servas*, 1 Cir. 1961, 294 F.2d 841, 847.

The national importance of the HEW Guidelines, the evident thoroughness with which these standards were prepared and formulated by educational authorities, the similarity of the HEW standards to the standards this Court and the Supreme Court have established, and the manifest effort of the Office of Education to be faithful to the congressional objectives of the 1964 Civil Rights Act entitle the HEW Guidelines to greater weight by the courts than run-of-the-mine policy statements low in the hierarchy of administrative declarations.

Courts therefore should cooperate with the congressional-executive policy in favor of desegregation and against aiding segregated schools.

D. Because our approval of a plan establishes eligibility for federal aid, our standards should not be lower than those of HEW. Unless judicial stand-

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experience and broader investigations and information than is likely to come to a judge in a particular case. They do determine the policy which will guide applications for enforcement by injunction on behalf of the Government. *Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons.*" (Emphasis added.)

ards are substantially in accord with the Guidelines, school boards previously resistant to desegregation will resort to the courts to avoid complying with the minimum standards HEW promulgates for schools that desegregate voluntarily. As we said in *Singleton I*:

> "If in some district courts judicial guides for approval of a school desegregation plan are more acceptable to the community or substantially less burdensome than H.E.W. guides, school boards may turn to the federal courts as a means of circumventing the H.E.W. requirements for financial aid. Instead of a uniform policy relatively easy to administer, both the courts and the Office of Education would have to struggle with individual school systems on ad hoc basis. If judicial standards are lower, recalcitrant school boards in effect will receive a premium for recalcitrance; the more the intransigence, the bigger the bonus." 348 F.2d at 731.

In *Kemp v. Beasley*, 8 Cir. 1965, 352 F.2d 14, the Court concluded:

> "[HEW] standards must be heavily relied upon. . . . Therefore, to the end of promoting a degree of uniformity and discouraging reluctant school boards from reaping a benefit from their reluctance the courts should endeavor to model their standards after those

promulgated by the executive." 352 F.2d at 18, 19.

Concurring, Judge Larson, speaking from his experience as a district judge, pointed out that school boards which do not act voluntarily retard the desegregation process to the disadvantage of the individual's constitutional rights: "Judicial criteria", therefore, "should probably be more stringent" than HEW Guidelines:

> "A school board which fails to act voluntarily forces Negro students to solicit aid from the courts. This not only shifts the burden of initiating desegregation, but inevitably means delay in taking the first step. As Judge Gibson observes, we are not here concerned with regulating the flow of Federal funds. Our task is to safeguard basic constitutional rights. Thus, our standards should be directed toward full, complete, and final realization of those rights." 352 F.2d at 23.

The announcement in HEW regulations that the Commissioner would accept a final school desegregation order as proof of the school's eligibility for federal aid prompted a number of schools to seek refuge in the federal courts. Many of these had not moved an inch toward desegregation.[49] In Louisiana

[49] The following statement appeared in the Shreveport Journal for July 1, 1965: "The local school boards prefer a court order over the voluntary plan because HEW regulations governing the voluntary plans or compliance agreements demand complete desegregation of the entire system, including students, faculty, staff, lunch workers, bus drivers, and administrators, whereas the court-ordered plans can be more or less negotiated with the judge." This was not news to the Court.

alone twenty school boards obtained quick decrees providing for desegregation according to plans greatly at variance with the Guidelines.[50]

We shall not permit the courts to be used to destroy or dilute the effectiveness of the congressional policy expressed in Title VI. There is no bonus for foot-dragging.

E. The experience this Court has had in the last ten years argues strongly for uniform standards in court-supervised desegregation.

The first school case to reach this Court after *Brown v. Board of Education* was *Brown v. Rippey*, 5 Cir. 1956, 237 F.2d 796. Since then we have reviewed 41 other school cases, many more than once.[51] The

[50] We may also expect a number of school desegregation suits to be filed in Alabama. The legislature has enacted a statute declaring the Guidelines null and void in Alabama and prohibiting school officials signing any agreement to comply. The bill provides that any agreement or assurance of compliance with the guidelines already in effect "is null and void and shall have no binding effect." H.B. 446, approved September 2, 1966.

[51] The brief of the United States gives the following figures:

"1. Case Load

	District Court	Court of Appeals	Supreme Court
Number of Cases	128	42	5
Number of Orders Entered	513	76	10

2. Frequency of Appeals to this Court

Number of Cases With One or More Appeals	42
Number of Cases With Two or More Appeals	21
Number of Cases With Three or More Appeals	8
Number of Cases With Four or More Appeals	4
Number of Cases With Five or More Appeals	2

In Bush v. Orleans Parish School Board the complaint was filed September 5, 1952. Bush's peregrinations through the courts are reported as follows: 138 F.Supp. 336 (3-Judge 1956) motion for leave to file petition for mandamus denied, 351 U. S. 948 (1956); 138 F. Supp. 337

district courts in this circuit have considered 128 school cases in the same period. Reviewing these cases imposes a taxing, time-consuming burden on the courts not reflected in statistics. An analysis of the cases shows a wide lack of uniformity in areas where there is no good reason for variations in the schedule and manner of desegregation.[32] In some cases there has been a substantial time-lag between this Court's opinions and their application by the district courts.[33] In certain cases—which we consider unnecessary to cite—there has even been a manifest variance between this Court's decision and a later district court decision. A number of district courts still mistakenly assume that transfers under Pupil Placement Laws—superimposed on unconstitutional initial assignment—satisfy the requirements of a desegregation plan. The lack of clear and uniform standards to govern school boards has tended to put a premium on delaying actions. In sum, the lack of uniform standards has retarded the development of

(1956), aff'd 242 F.2d 156 (1957), cert. den'd, 354 U.S. 921 (1957); 252 F.2d 253, cert. den'd 356 U.S. 969 (1958); 163 F. Supp. 701 (1958), aff'd, 268 F.2d 78 (1959); 187 F. Supp. 42 (3-judge 1960), motion to stay den'd, 364 U.S. 803 (1960), aff'd 365 U.S. 569 (1961); 188 F. Supp. 916 (3-judge 1960), motion for stay denied, 364 U.S. 500 (1960), aff'd, 365 U.S. 569 (1961); 190 F. Supp. 861 (3-judge 1960), aff'd 366 U.S. 212 (1961); 191 F. Supp. 871 (3-judge 1961), aff'd 367 U.S. 908 (1961); 194 F. Supp. 182 (3-judge 1961), aff'd, 367 U.S. 907 (1961), 368 U.S. 11 (1961); 204 F. Supp. 568 (1962); 205 F. Supp. 893 (1962), aff'd in part and rev'd in part, 308 F.2d 491 (1962); 230 F. Supp. 869 (1963).

[32] Of the 99 court-approved freedom of choice plans in this circuit, 44 do not desegregate all grades by 1967; 78 fail to provide specific, non-racial criteria for denying choices; 79 fail to provide any start toward faculty desegregation; only 23 provide for transfers to take courses not otherwise available; only 4 include the *Singleton* transfer rule.

[33] See footnote 39.

local responsibility for the administration of schools without regard to race or color. What was true of an earlier Athens and an earlier Rome is true today: In Georgia, for example, there should not be one law for Athens and another law for Rome.

Before HEW published its Guidelines, this Court had already established guidelines for school desegregation: to encourage uniformity at the district court level and to conserve judicial effort at both the district court and appellate levels. We did so by making detailed suggestions to the district courts. *Lockett v. Board of Education of Muscogee County*, 5 Cir. 1964, 342 F.2d 225; *Bivens v. Board of Education for Bibb County*, 5 Cir. 1965, 242 F.2d 229; *Armstrong v. Board of Education of Birmingham*, 5 Cir. 1964, 333 F.2d 47; *Davis v. Board of School Commissioners of Mobile County*, 5 Cir. 1964, 333 F.2d 53; *Stell v. Savannah-Chatham County Board of Education*, 5 Cir. 1964, 333 F.2d 55; *Gaines v. Dougherty County Board of Education*, 5 Cir. 1964, 334 F.2d 983. In other areas of the law involving recurrent problems of regional or national interest, this Court has also found guidelines advantageous. In *United States v. Ward*, 5 Cir. 1965, 347 F.2d 795, and *United States v. Palmer*, 5 Cir. 1966, 356 F.2d 951, suits to enjoin registrars of voters from discriminating against Negroes, we attached identical proposed decrees for the guidance of district courts.[54] See also

[54] In *Ward* the Court said: "[G]ood administration suggests that the proposed decree be indicated by an Appendix, not because of any apprehension that the conscientious District Judge would not faithfully impose every condition so obviously implied, but rather because of factors bearing upon administration

Scott v. Walker, 5 Cir. 1966, 358 F.2d 561, one of a series of cases on the exclusion of Negroes from juries.

F. We summarize the Court's policy as one of encouraging the maximum legally permissible correlation between judicial standards for school desegregation and HEW Guidelines. This policy may be applied without federal courts' abdicating their proper judicial function. The policy complies with the Supreme Court's increasing emphasis on more speed and less deliberation in school desegregation.[55] It is consistent with the judiciary's duty to the Nation to cooperate with the two other coordinate branches of government in carrying out the national policy expressed in the Civil Rights Act of 1964

III.

The defendants contend that the Guidelines require integration, not just desegregation; that school boards have no affirmative duty to integrate. They say that

itself. It is not possible, or even desirable, of course to achieve absolute uniformity. But in this ever growing class of cases which have their genesis in unconstitutional lack of uniformity as between races, courts within this single circuit should achieve a relative uniformity without further delay." 349 F.2d at 805.

[55] "There has been entirely too much deliberation and not enough speed in enforcing the constitutional rights which we held in Brown v. Board of Education had been denied Prince Edward County Negro children." Griffin v. County School Board of Prince Edward County, 1964, 377 U.S. 218, 229, 84 S.Ct. 1226, 12 L.Ed.2d 256, 264. See also Rogers v. Paul and Bradley v. School Board of the City of Richmond, 1965, 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187. "*Brown* never contemplated that the concept of 'deliberate speed' would countenance indefinite delay in elimination of racial barriers in schools. . . ." (Goldberg, J.) Watson v. City of Memphis, 1963, 373 U.S. 526, 530, 83 S.Ct. 1314, 1317, 10 L.Ed.2d 529, 534.

in this respect the Guidelines are contrary to the provisions of the Civil Rights Act of 1964 and to constitutional intent expressed in the Act. *This argument rests on nothing that the United States Supreme Court held or said in Brown or in any other case.* It rests on two glosses on *Brown*: the opinions in *Briggs v. Elliott*, E.D.S.C. 1955, 132 F. Supp. 776 and *Bell v. School City of Gary*, N.D. Ind. 1963, 213 F. Supp. 819, aff'd, 7 Cir. 1963, 324 F.2d 209. *Briggs*, decided only six weeks after *Brown II*, is one of the earliest cases in this field of law. The portion of the opinion most quoted is pure dictum. *Briggs* did not paraphrase the law as the Supreme Court stated it in *Brown* or as the law must be stated today in the light of *Aaron v. Cooper*, *Rogers v. Paul* and *Bradley v. School Board*. These and other decisions compel states in this circuit to take affirmative action to reorganize their school systems by integrating the students, faculties, facilities, and activities. As for *Bell*, it is inapplicable to cases in this circuit, all of which involve formerly de jure segregated schools. Although the legislative history of the statute shows that the floor managers for the Act and other members of the Senate and House cited and quoted these two opinions they did so within the context of the problem of de facto segregation. A study of the Guidelines shows that the HEW standards are within the rationale of *Brown* and the congressional objectives of the Act.

A. *Briggs*, an action to desegregate the public schools in Clarendon County, South Carolina, was one

of the school cases consolidated with *Brown v. Board of Education of Topeka, Kansas*. On remand, a distinguished court (Parker and Dobie, Circuit Judges, and Timmerman, District Judge) felt that it was important to "point out exactly what the Supreme Court has decided and what it has not decided." The Court said:

> "It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. . . . *The Constitution, in other words, does not require integration. It merely forbids segregation.*" 132 F. Supp. at 777.

Ten years later Clarendon County schools were still totally segregated.[56]

This Court and other courts, gratuitously for the most part, have often paraphrased or quoted with approval the *Briggs* dictum.[57] It is not surprising,

[56] See Brunson v. Board of Trustees of School District No. 1, 4 Cir. 1962, 311 F.2d 107; Southern Education Reporting Service, Statistical Summary, Nov. 1964, p. 46.

[57] The Fifth Circuit cases are: Borders v. Rippy, 1957, 247 F.2d 268, 271; Boson v. Rippy, 1960, 285 F.2d 43, 48; Lockett v. Board of Education of Muscogee County, 5 Cir. 1965, 342 F.2d 225; Avery v. Wichita Falls Independent School District, 1966, 241 F.2d 230, 233; Stell v. Savannah-Chatham County Board of Education, 1964, 333 F.2d 55, 59; Evers v. Jackson, 1964, 328 F.2d 408; cf.

therefore, that *Briggs* prompted Pupil Placement Laws, the most effective technique for perpetuating school segregation. And it is not surprising that school officials—the *Briggs* dictum dinned into their ears for a decade—have not now faced up to faculty integration. However, as this Court's experience in handling school cases increased, the Court became aware of the frustrating effects of *Briggs*. In *Singleton I* we referred to the dictum as "inconsistent with Brown [II] and the later development of decisional and statutory law in the area of civil rights." 348 F. 2d at 730 n.5. In *Singleton II* we called it an "oversimplified" construction of *Brown I*. We added: "The Constitution forbids unconstitutional state action in the form of segregated facilities, including segregated public schools. School authorities, therefore, are under the constitutional compulsion of furnishing a single, integrated school system." 355 F.2d at 369.

Cohen v. Public Housing Administration, 1958, 257 F.2d 73 (public housing); City of Montgomery v. Gilmore, 1960, 277 F.2d 364 (public parks). For a list of cases in other circuits see footnotes 10 and 11 in Blocker v. Board of Education of Manhasset, E.D.N.Y. 1964, 226 F. Supp. 208, 220. In *Blocker* Judge Zavitt notes that "the construction draws continuing sustenance through a process in which each case relies upon a preceding one; it would appear that the ultimate and solitary source is this dictum in Briggs v. Elliott." 226 F. Supp. at 220.

In Borders v. Rippy, 5 Cir. 1957, 247 F.2d 268, the Court reversed the judgment of the district court dismissing the complaint and directed the entry of a judgment enjoining the defendants "from requiring segregation of the races in any school under their supervision". On remand, the district court entered an order enjoining the defendants "from requiring or *permitting* segregation of the races in any school under their supervision". On the second appeal, in Rippy v. Borders, 5 Cir. 1957, 250 F.2d 690, 692, the Court again reversed the district court, stating: "We have emphasized the words *'or permitting segregation of the races'* in the district court's order because that expression might indicate a serious misconception of the applicable law and of the mandate of this Court. Our mandate (footnote 1, supra) had been carefully limited so as to direct the entry of a judgment restraining and enjoining the defendants *'from requiring segrega-*

Other federal courts have disapproved of the *Briggs* dictum.[58]

tion of the races in any school under their supervision' (emphasis supplied). Likewise in our opinion, we had pointed out that is only *racially discriminatory* segregation in the public schools which is forbidden by the Constitution."

[58] In Kemp v. Beasley the Eighth Circuit remarked, "The dictum in *Briggs* has not been followed or adopted by this Circuit and is logically inconsistent with Brown." Blocker v. Board of Education of Manhasset, E.D.N.Y. 1964, 226 F.Supp. 208, makes a frontal attack on *Briggs*. In that case, which concerned segregation characterized as *de jure*, Judge Zavitt observed that even where the *Briggs* dictum has seemingly been adopted, "it appears to be in a state of diminishing force, if not outright erosion", citing Dillard v. School Board of the City of Charlottesville, 4 Cir. 1962, 308 F.2d 920, *cert. denied*, 374 U.S. 827 (1963), and McCoy v. Greensboro City Board of Education, 4 Cir. 1960, 283 F.2d 667. The Third Circuit, reversing a district court's approval of a year-by-year plan, ignored *Briggs:* "if the plan as approved by the court below be not drastically modified, a large number of the Negro children of Delaware will be deprived of education *in integrated* schools, despite the fact that the *Supreme Court has unqualifiedly declared integration to be their constitutional right.*" (Emphasis added.) Evans v. Ennis, 3 Cir. 1960, 281 F.2d 385, 389, *cert. den'd* 364 U.S. 933. In Evans v. Ennis, only three school districts were involved. Nevertheless, the court required the district judge to order the State Board of Education and the State Superintendent of Delaware to prepare "a plan which will provide for the *integration* of all grades of the public school system of Delaware." "Eventually", Judge Biggs said, "a wholly integrated school system will be effected for Delaware: 'wholly integrated' in the sense that all school children, whether white or Negro, . . . will attend schools without regard to race or color." Sometimes a court's action in regard to the school board's affirmative duty has spoken louder than *Briggs's* words. In Evans v. Buchanan, D.C. Del. 1962, 207 F. Supp. 820, although the court cited *Briggs* and stated that the Fourteenth Amendment "does not contemplate compelling action; rather it is a prohibition preventing the States from applying their laws unequally", the court did compel the school boards to act. The Court found that the Negro school children who wished to attend integrated schools were attending an all-Negro school, with an all-Negro faculty, surrounded by white attendance area. On those bare facts, the Court found: "The . . . Board as promulgator of the plan and the State Board of Education as the party having the ultimate responsibility for administering a nondiscriminatory system of public education should have the initial burden of coming forward *since a presumption of unconstitutionality arises* under this set of facts." 207 F. Supp. at 825. (Emphasis added.) The facts were "highly probative" of intentional

The *Briggs* dictum may be explained as a facet of the Fourth Circuit's now abandoned view that Fourteenth Amendment rights are exclusively individual rights and in school cases are to be asserted individually after each plaintiff has exhausted state administrative remedies.[59] The Court disallowed class suits because Negro students who had not asked for transfers to white schools had not individually exhausted their remedies and were therefore not similarly situated with the plaintiffs. Thus in *Carson v. Warlick*, 4 Cir. 1956, 238 F.2d 724, Judge John Parker, for the Court, stated:

> "There is no question as to the right of these [Negro] school children. . . . They are to be admitted, however, as individuals, not as a class or group; and it is as individuals that their rights under the Constitution are asserted. . . . [The] school board must pass upon individual applications made individually to the board. . . ." 238 F.2d at 729.

In *Covington v. Edwards*, 4 Cir. 1959, 264 F.2d 780, 783, the court commented that "the County board has taken no steps to put an end to the planned segre-

racial discrimination and the evidence of intent rested largely with the Board. The Board came forward and showed that its plan was based on such neutral factors as the safety of the children, facilities, location, and access roads. The court, however, held that the Board did not rebut the presumption by showing that the plan could be justified as rational and nondiscriminatory. The obviously sophisticated trial judge observed, "In effect, counsel is asking the States to intentionally gerrymander districts which may be rational when viewed by acceptable, nondiscriminatory criteria". *Id.* at 824.

[59] See U. S. Comm. on Civil Rights, Civil Rights U.S.A.—Public Schools, Southern States (1962), p. 7.

gation", but still held for the board for failure of the plaintiffs to exhaust their remedies and for filing the suit as a class action. In a later opinion in this case, sub.nom. *Jeffers v. Whitley*, 309 F.2d 621, the Court found that the plaintiffs had failed to establish that they were "denied any constitutional right because of their race or color". The court observed,

> "It can fairly be said that what the children and their parents are still seeking is only a desegregation of the Conwell County School System rather than a protection of their own rights. . . ."

The Fourth Circuit abandoned this view in *Green v. School Board of the City of Roanoke*, 4 Cir. 1962, 304 F.2d 118, holding that since administrative remedies need not be exhausted, a class suit is proper. "[It] would be almost a cruel joke to say that administrative remedies must be exhausted when it is known that such exhaustion of remedies will not terminate the pattern of a racial assignment." *Jackson v. School Board of City of Lynchburg*, W.D. Va. 1962, 201 F. Supp. 620. *McNeese v. Board of Education for School District 187*, 1963, 373 U. S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622, put beyond debate the need to exhaust remedies and the right of Negro students to file a class action. See also *Armstrong v. Board of Education of the City of Birmingham*, 5 Cir. 1963, 323 F.2d 333, cert. denied sub.nom. *Gibson v. Harris*, 376 U.S. 905 (1964).

In the sense that an individual pupil's right under the equal protection clause is a "personal and present" right not to be discriminated against by being segregated,[60] the dictum is a cliché. The Fourteenth Amendment provides, "nor shall any state . . . deny to any *person* within its jurisdiction the equal protection of the laws". The dictum may also be defensible, if the *Briggs* court used the term "integration" to mean an absolute command at all costs that each and every Negro child attend a racially balanced school.[61] But what is wrong about the dictum is more important than what is right about it. What is wrong about *Briggs* is that it drains out of *Brown* that deci-

[60] For example: ". . . the essence of the constitutional right is that it is a personal one. . . . It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded". McCabe v. Atchison, T. & S.F. Ry., 1914, 235 U. S. 151, 161-62, 35 S.Ct. 69, 59 L.Ed. 169. The legislative history of the 14th Amendment provides no information on this point. See Frank and Munro, The Original Understanding of Equal Protection of the Laws, 50 Colum. L. Rev. 131 (1950); Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1 (1955). But "the personal nature of the right to be free from discrimination was declared in order to make the existence of such right independent of the number of other members of the *same* racial group who were victimized by the discrimination. . . ." Hartman, The Right to Equal Educational Opportunities as a Personal and Present Right, 9 Wayne L. Rev. 424, 427 (1963).

[61] What is meant by the statement of "no duty to integrate" is that a school board "does not have to completely alter boundaries and to insure that every school district is mixed, even though some students will have a great distance to travel . . . [E]ven though the state is not required to integrate fully every school and child, this does not mean that the state may not have certain responsibilities to children of a minority race while educating them, the failure to perform which may be unconstitutional". Sedler, School Segregation in the North and West: Legal Aspects, 7 St. Louis U.L.J. 228, 251 (1963). See also the discussion of Barksdale v. Springfield School Comm., at 65-67, infra.

sion's significance as a class action to secure equal educational opportunities for Negroes by compelling the states to reorganize their public school systems.[62] All four of the original *School Segregation* cases were class actions and described as such in the opinions. 347 U. S. at 455.

We do not minimize the importance of the Fourteenth Amendment rights of an individual, but there

[62] Rule 23a, Fed. R. Civ. P., before the recent amendments, was unclear as to whether a favorable decree applies to members of the class who do not join in the suit. *Compare* 3 Moore, Federal Practice 3434 (2d Ed.) *with* Chafee, Some Problems in Equity 199-295 (1950). "In dealing with [segregation] cases, courts have largely disregarded Moore's classifications, and have indicated that an injunction would run to the benefit of absentees." Developments in the Law—Multiparty Litigation in the Federal Courts, 71 Harv. L. Rev. 874, 935 (1958). Citing *Brown II*, 349 U. S. at 300-301 dictum; *Brown I*, 347 U. S. at 495 (dictum); Orleans Parish School Board v. Bush, 5 Cir. 1957, 242 F.2d 156, 165-66 (dictum); Browder v. Gayle, M.D. Ala. 1956, 142 F. Supp. 707, 711, 714, aff'd per curiam, 352 U. S. 903 (1956); Frasier v. Board of Trustees of University of North Carolina, M.D.N.C. 1955, 134 F. Supp. 589, *aff'd per curiam*, 350 U. S. 979 (1956).

"Violations of the Fourteenth Amendment are of course violations of individual or personal rights, but where they are committed . . . generally because of race, they are no less entitled to be made the subject of class actions and class adjudications under Rule 23. . . . than are other several rights." Kansas City v. Williams, 8 Cir. 1953, 205 F.2d 47, 52, *cert. denied* 346 U. S. 826 (1953). See also Holmes v. City of Atlanta, N. D. Ga. 1954, 124 F. Supp. 290, aff'd 223 F.2d 93, judgment vacated and remanded for a broader decree in conformity with Mayor and City of Baltimore v. Dawson, 350 U. S. 977 (1955); Jeffers v. Whitley, 4 Cir. 1962, 309 F.2d 621; Brunson v. Board of Trustees of School District No. 1, 4 Cir. 1962, 311 F.2d 107, *cert. denied* 373 U. S. 933 (1963).

See Comment, The Class Action Device in Antisegregation Cases, 20 U. Chi. L. Rev. 577 (1953). See also Comment, Multiparty Litigation in the Federal Courts, 71 Harv. L. Rev. 874, 935; McKay, "With All Deliberate Speed"—A Study of School Desegregation, 31 N.Y.U.L. Rev. 991, 1084-86 (1956); Class Actions—A Study of Group Interest Litigation, 1 Race Rel. Rep. 991 (1956); Meador, The Constitution and the Assignment of Pupils to Public Schools, 45 Va. L. Rev. 517, 523 (1959).

was more at issue in *Brown* than the controversy between certain schools and certain children. *Briggs* overlooks the fact that Negroes collectively are harmed when the state, by law or custom, operates segregated schools or a school system with uncorrected effects of segregation.

Denial of access to the dominant culture, lack of opportunity in any meaningful way to participate in political and other public activities, the stigma of apartheid condemned in the Thirteenth Amendment are concomitants of the dual educational system. The unmalleable fact transcending in importance the harm to individual Negro children is that the separate school system was an integral element in the Southern State's general program to restric. Negroes as a class from participation in the life of the community, the affairs of the State, and the mainstream of American life: Negroes must keep their place.[62]

"[S]egregation is a group phenomenon. Although the effects of discrimination are felt by each member of the group, any discriminatory practice is directed against the group as a uni' and against individuals only as their connection w.. the group in-

[62] In United States v. Louisiana, E.D. La. 1963, 225 F. Supp. 353, aff'd 380 U.S. 145, the court traced the history of voting in Louisiana to show that the black codes, the grandfather clause, the white primary, literacy tests, and other devices were all members of a seemingly endless series designed to bar access of Negroes to the dominant culture and to political power. The same situation exists with regard to denial of equal educational opportunities. So-called freedom of choice plans, *as thus far utilized*, follow pupil placement laws, which followed the "separate-but-equal" dodge in the educational series of devices to limit access of Negroes to the polity.

volves the antigroup sanction. . . . [As] a group-wrong . . . the mode of redress must be group-wide to be adequate."[64] Adequate redress therefore calls for much more than allowing a few Negro children to attend formerly white schools; it calls for liquidation of the state's system of de jure school segregation and the organized undoing of the effects of past segregation. "Beyond [a child's] personal right [under the Fourteenth Amendment] however, or perhaps as an aspect of it, the lower federal courts seem to be recognizing a right in Negro school children, enforceable at least by a class action, *to have the school system administered free of an enforced policy of segregation* irrespective of whether any colored pupil has been denied admission to any particular school on the ground of his race."[65]

It is undoubtedly true that the intangible inadequacies of a segregated education harm the individual, but the Supreme Court treated these inadequacies as inherent attributes which prevail universally.[66] For example, the Court said:

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[64] Note, 20 U. Chi. L. Rev. 577 (1953).

[65] Meador, The Constitution and the Assignment of Pupils to Public Schools, 45 Va. L. Rev. 517, 523 (1959).

[66] In *Brown* the unanimous court, through Chief Justice Warren, cited the Slaughter House Cases, 1872, 83 U.S. (16 Wall.) 36, 71 in which the Court stated: ". . . one pervading purpose found in [all of these amendments], lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the Fifteenth Amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth." The Court also quoted the following passage from Strauder v. West Vir-

> [Education] is the very foundation of good citizenship. Today it is a principal instrument in *awakening the child to cultural values*, in preparing him for later professional training, and in *helping him to adjust normally to his environment*. In these days, it is doubtful that any child may reasonably be expected to succeed if he is denied the opportunity of an education. Such an opportunity where the state has undertaken to provide it, is a right which must be made available to all on equal terms 347 U.S. at 493. (Emphasis added.)

Again, in a critical passage:

> To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and mind in a way unlikely ever to be undone. 347 U.S. at 494.

With this predicate it is not surprising that *Brown II*, a year after *Brown I* was decided, going beyond recognition of the "*personal*" right in the individual plaintiffs, fashioned a remedy appropriate for the class. The Court imposed on the states the duty of furnishing an integrated school system, that is, the

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ginia, 1879, 100 U.S. 303, 307: "The words of the amendment . . . contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race."

duty of "effectuat[ing] a transition to a racially nondiscriminatory school *system*."[67] (Emphasis added.) In addition, *Brown II* subordinated the "*present*" right in the individual plaintiffs to the right of Negroes as a class to a unitary, nonracial system—some time in the future.[68]

The central vice in a formerly de jure segregated public school system is apartheid by dual zoning: in the past by law, the use of one set of attendance zones for white children and another for Negro children, and the compulsory initial assignment of a Negro to the Negro school in his zone. Dual zoning per-

[67] "[T]he courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. . . . To that end the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, *personnel*, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems." Brown v. Board of Education, 349 U.S. 294, 300-01. (Emphasis added.)

[68] "If it is the Negro population as a minority group which is entitled to attend public facilities, then the objective of any corrective plan would be to bring about complete integration of all Negro children in public education." Hartman, The Right to Equal Educational Opportunities as a Personal and Present Right, 9 Wayne L. Rev. 424, 441 (1963). Cf. Greenberg, Race Relations and Group Interests in the Law, 13 Rutgers L. Rev. 503, 506 (1959). There would be no necessary conflict between the individual's "personal and present" right and the class right if the Brown, Cooper v. Aaron, Bradley, and Rogers v. Paul decisions were read as recognizing the immediate right of any Negro plaintiff to transfer to a white school, over and above the state's duty to reorganize its school system. Thus in Watson v. City of Memphis, 1963, 373 U.S. 526, 533, 83 S.Ct. 1314, 10 L.Ed.2d 529, the Supreme Court stated that the rights asserted in that case "are, like all such rights, *present* rights . . . warrants for the here and now and, unless there is an overwhelmingly compelling reason they are to be promptly fulfilled."

sists in the continuing operation of Negro schools identified as Negro, historically and because the faculty and students are Negroes. Acceptance of an individual's application for transfer, therefore, may satisfy that particular individual; it will not satisfy the class. The class is all Negro children in a school district attending, by definition, inherently unequal schools and wearing the badge of slavery separation displays. Relief to the class requires school boards to desegregate the school from which a transferee comes as well as the school to which he goes. It requires conversion of the dual zones into a single system. Faculties, facilities, and activities as well as student bodies must be integrated. No matter what view is taken of the rationale in *Brown I*, *Brown II* envisaged the remedy following the wrong, the state's correcting its discrimination against Negroes as a class, through separate schools, by initiating and operating a unitary integrated school system. The gradual transition the Supreme Court authorized was to allow the states time to solve the administrative problems inherent in that change-over. *No delay would have been necessary if the right at issue in* Brown *had been only the right of individual Negro plaintiffs to admission to a white school. Moreover, the delay of one year in deciding* Brown II *and the gradual remedy* Brown II *fashioned can be justified only on the ground that the "personal and present" right of the individual plaintiffs must yield to the overriding right of Negroes as a class to a completely integrated public education.*

Although psychological harm and lack of educational opportunities to Negroes may exist whether caused by de facto or de jure segregation, a state policy of apartheid aggravates the harm. Thus, Chief Justice Warren quoted with approval the finding of the district court in the *Kansas* case: "The impact [of the detrimental effect of segregation upon Negro children] is greater when it has the sanction of the law; for the policy of separating the race is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive *in a racial[ly] integrated school system.*" (Emphasis added.) *Brown I*, 347 U.S. at 494. The State, therefore, should be under a duty to take whatever corrective action is necessary to undo the harm it created and fostered.** "State authorities

** "Indeed, the requirement of affirmative action lies at the very heart of Brown; seventeen states had to abandon racial criteria and affirmatively reorganize school attendance plans." Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 Harv. L.Rev. 564, 612 (1965). See also Gillmor and Gosule, Duty to Integrate Public Schools?. Some Judicial Responses and a Statute, 46 Bost. U. L. Rev. 45, 62-3 (1966). "State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the equal protection clause." Cooper v. Aaron, 1958, 358 U.S. 1, 19, 78 S.Ct. 1401, 3 L.Ed.2d 5. ". . . Most of the major decisions of the Warren Court under the equal protection clause impose affirmative obligations upon the states. Earlier cases sustaining a constitutional claim were typically mandates directing the government to refrain from a particular form of regulation. Now the emphasis is upon measures the states must adopt in carrying on their activities and steps they must take [even] to offset disabilities not of their creation". Cox, Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91, 93 (1966).

were thus *duty bound* to devote every effort toward *initiating desegregation* and bringing about the elimination of racial discrimination in the public school *system.*" (Emphasis added.) *Cooper v. Aaron,* 358 U.S. at 7. Some may doubt whether tolerance of de facto segregation is an unsubtle form of state action. There can be no doubt as to the nature and effect of segregation that came into being and persists because of state action as part of the longstanding pattern to narrow the access of Negroes to political power and to the life of the community.

In a school system the persons capable of giving class relief are of course its administrators. It is they who are under the affirmative duty to take corrective action toward the goal of one integrated system. As Judges Sobeloff and Bell said in *Bradley v. School Board of the City of Richmond,* 4 Cir. 1965, 345 F.2d 310, 322:

> "*. . . the initiative in achieving desegregation of the public schools must come from the school authorities. . . . Affirmative action means more than telling those who have long been deprived of freedom of educational opportunity. 'You now have a choice.' . . .* It is now 1965 and high time for the court to insist that good faith compliance requires administrators of schools to proceed actively with *their* nontransferable duty to undo the segregation which both by action and inaction has been persistently perpetuated. (Emphasis added.)

In *Northcross v. Board of Education of the City of Memphis*, 6 Cir. 1962, 302 F.2d 818, the defendants asserted, as the defendants assert here, that continued segregation is "voluntary on the part of Negro pupils and parents because they do not avail themselves of the transfer provisions." The Court held: "The Pupil Assignment Law . . . will not serve as a plan to convert a biracial system into a nonracial system . . . Negro children cannot be required to apply for that to which they are entitled as a matter of right. . . . *The burden rests with the school authorities to initiate desegregation . . . [The Board] should submit some realistic plan for the organization of their schools on a nonracial basis*". (Emphasis added.) In *Dowell v. School Board of Oklahoma City Public Schools*, W. D. Okla. 1965, 244 F. Supp. 971, 975, 978-79, the School Board in Oklahoma City had "superimposed" a geographic zone plan on "already existing residential segregation initiated by law." The court held: A school board must "adopt policies that would increase the percentage of pupils who are obtaining a desegregated education. . . .[The] failure to adopt an affirmative policy is itself a policy, adherence to which, at least in this case, has slowed up . . . the desegregation process. . . . [W]*here the cessation of assignment and transfer policies based solely on race is insufficient to bring about more than token change in the segregated system, the Board must devise affirmative action reasonably purposed to effectuate the desegregation goal.* This conclusion makes no new law."

The position we take in these consolidated cases is that *the only adequate redress for a previously overt system-wide policy of segregation directed against Negroes as a collective entity is a system-wide policy of integration.* In *Singleton I* the Court touched on the state's duty to integrate:

> "In retrospect, the second Brown opinion clearly imposes on public school authorities the duty to provide an integrated school system. Judge Parker's well-known dictum should be laid to rest. It is inconsistent with Brown and the later development of decisional and statutory law in the area of civil rights." 348 F.2d at 730 n.5.

Three years before *Singleton I* this Court analyzed the problem in *Potts v. Flax*, 5 Cir. 1963, 313 F.2d 284. In that case the Court rejected a school board's contention that a suit brought by two Negro parents was not a class action even though the record contained testimony that one parent was bringing the action only for his own children and not for other Negro children. The Board contended that a court order was not needed because it was willing to admit any Negro child to a white school on demand of any Negro child. Judge Brown, speaking for the Court, said:

> "Properly construed the purpose of the suit was not to achieve specific assignment of specific children to any specific grade or school. The peculiar rights of specific individuals were not in controversy. It was directed at the *system-wide policy* of racial segrega-

> tion. It sought obliteration of that policy of system-wide racial discrimination. . . ."[70]

Even before *Potts v. Flax,* in *Bush v. Orleans Parish School Board,* 5 Cir. 1962, 308 F.2d 492, 499, the Court said:

> "In this aspect of [initial] pupil assignment [to segregated schools] the facts present a clear case where there is not only deprivation of the rights of the individuals directly concerned but deprivation of the rights of Negro school children as a class. As a class, and irrespective of any individual's right to be admitted on a non-racial basis to a particular school, Negro children in the public schools have a constitutional right to have the public school system administered free from an administrative policy of segregation."[71]

[70] The Court also said: "There is at least considerable doubt that relief confined to individual specified Negro children either could be granted or, if granted, could be so limited in its operative effect. By the nature of the controversy, the attack is on the unconstitutional practice of racial discrimination. Once that is found to exist, the Court must order that it be discontinued. Such a decree, of course, might name the successful plaintiff as the party not to be discriminated against. But that decree may not—either expressly or impliedly—affirmatively authorize continued discrimination by reason of race against others. Cf. Shelley v. Kramer, 1948, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161. Moreover, to require a school system to admit the specific successful plaintiff Negro child while others, having no such protection, were required to attend schools in a racially segregated system, would be for the court to contribute actively to the *class* discrimination proscribed by Bush v. Orleans Parish School Board, 5 Cir. 1962, 308 F.2d 491, 499, on rehearing 308 F.2d 503; see also Ross v. Dyer, 5 Cir. 1962, 312 F.2d 191." Potts v. Flax, 313 F.2d at 289.

[71] The Court also said: "Geographical districts based on race are a parish-wide system of unconstitutional classification. Of course, it is undoubtedly true that Brown v. Board of Education

See also *Ross v. Dyer*, 5 Cir. 1963, 312 F.2d 191, 194-95; *Augustus v. Board of Public Instruction of Escambia County*, 5 Cir. 1963, 306 F.2d 862, 869; *Holland v. Board of Public Instruction of Palm Beach County*, 5 Cir. 1958, 258 F.2d 730; *Orleans Parish School Board v. Bush*, 5 Cir. 1957, 242 F.2d 156.

Brown was an inevitable, predictable extension of *Sweat v. Painter*, 1950, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114, and *McLaurin v. Oklahoma State Regents*, 1950, 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149.[72] Those cases involved separate but equal or identical graduate facilities. Factors "incapable of objective measurement" but crucial to a good graduate education were not available to segregated Negroes. These were the intangible factors that prevented the Negro graduate students from having normal contacts and association wtith white students. Apartheid made the two groups unequal. In *Brown I* these same intangi-

dealt with only an individual child's right to be admitted to a particular school on a non-racial basis. And it is also true, as the second Brown opinion pointed out, that courts must bear in mind the 'personal interest' of the plaintiffs. In this sense, the Brown cases held that the law requires non-discrimination as to the individual, not integration. But when a statute has a statewide discriminatory effect or when a School Board maintains a parish-wide discriminatory policy or system, the discrimination is against Negroes as a class. Here, for example, it is the Orleans Parish dual system of segregated school districts, affecting all school children in the Parish by race, that, first, was a discriminatory classification and, second, established the predicate making it possible for the Pupil Placement Act to fulfill its behind-the-face function of preserving segregation." Bush v. Orleans Parish School Board, 308 F.2d at 499.

[72] See, for example, Ransmier, The Fourteenth Amendment and the "Separate but Equal" Doctrine, 50 Mich. L. Rev. 203, 238-40 (1951); Roche, Education, Segregation and the Supreme Court—A Political Analysis, 99 U. Pa. L. Rev. 949 (1951); Taylor, The Demise of Race Restrictions in Graduate Education, 1 Duke B. Jour. 135 (1951); Note, 26 St. John's L. Rev. 123 (1951).

bles were found "to apply with added force to children in grade and high schools"; educational opportunity in public schools must be made available to all on equal terms.

The *Brown I* finding that segregated schooling causes psychological harm and denies equal educational opportunities should not be construed as the sole basis for the decision.[73] So construed, the way would be open for proponents of the status quo to attempt to show, on the facts, that integration may be harmful or the lesser of two evils. Indeed that narrow view of *Brown I* has led several district courts

[73] Professor Edmund Cahn characterized as a "myth" the notion that the Brown decision was "sociological" rather than "legal". Cahn, Jurisprudence, 31 N.Y.U. L. Rev. 182 (1956); Cahn, Jurisprudence, 30 N.Y.U. L. Rev. 150 (1955). "I would not have the constitutional rights of Negroes—or of other Americans—rest on any such flimsy foundation as some of the scientific demonstrations in these records. . . . Heretofore, no government official has contended that he could deny equal protection with impunity unless the complaining parties offered competent proof that they would sustain or had sustained some permanent (psychological or other kind of) damage. The right to equal protection has not been subjected to any such proviso." Cahn, Jurisprudence, 30 N.Y.U. L. Rev. 150, 157, 158, 168 (1955). Professor Black has said: "The charge that it is 'sociological' is either a truism or a canard—a truism if it means that the Court, precisely like the *Plessy* court, and like innumerable other courts facing innumerable other issues of law, had to resolve and did resolve a question about social fact; a canard if it means that anything like principal reliance was placed on the formally 'scientific' authorities, which are relegated to a footnote and treated as merely corroboratory of common sense." Black, The Lawfulness of the Segregation Decision, 69 Yale L.J. 421, 430 n.25 (1960).

Acceptance of these views is not inconsistent with the continued vitality of the psychological findings in *Brown I*. Indeed, several studies have reinforced those findings. The most recent is the United States Office of Education's "Equality of Educational Opportunity", the two-year study authorized by section 402 of the Civil Rights Act of 1964 to investigate "the lack of availability of equal educational opportunities for individuals by reason of race, color, religion, or national origin in public educational institutions . . . ." 42 U.S.C. § 2000c—1.

into error.[74] We think that the judgment "must have rested on the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed."[75] The relief *Brown II* requires rests on recognition of the principle that state-imposed separation by race is an invidious classification and for that reason alone is unconstitutional.[76] Classifications based upon race are especially suspect, since they are "odius to a free people".[77] In short, compulsory separation, apartheid, is per se discriminatory against Negroes.

A number of post-*Brown* per curiam decisions not involving education make it clear that the broad dimensions of the rationale are not circumscribed by the necessity of showing *harmful* inequality to the

[74] See Stell v. Savannah-Chatham County Board of Education, S.D.Ga. 1963, 220 F. Supp. 667, rev'd 333 F.2d 55; 255 F.Supp. 84 (1965), appeal pending; 225 F.Supp. 88 (1966), appeal pending. See also Jackson Municipal Separate School District v. Evers, 5 Cir. 1966, 357 F.2d 653.

[75] Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 33 (1959). Professor Wechsler concluded: "For me, assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and constitutional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate . . ." The article started a vigorous debate. See authorities collected in Emmerson and Huber, Political and Civil Rights 1625-1629 (1967). See also Kaplan, Equality in an Unequal World, 61 NW U.L. Rev. 363 (1966).

For discussion of the inherently—arbitrary—classification principle against the principle of equality of educational opportunity, see Fiss, Racial Imbalance in the Public Schools: The Constitutional Concept, 78 Harv. L. Rev. 564, 590-98 (1965).

[76] See Pollak, Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler, 108 U. Pa. L. Rev. 1 (1959); Kaplan, Segregation Litigation and the Schools—Part I, The New Rochelle Experience 58 NW U. L. Rev. 1, 21 (1964).

[77] Korematsu v. United States, 1944, 323 U. S. 214, 216, 65 S. Ct. 193, 89 L. Ed. 194.

individual. In these cases Negroes were separated from whites but were afforded equal or identical facilities. Relying on *Brown*, the Court ordered integration of the facility or activity.[78] See also *Anderson v. Martin*, 1964, 375 U.S. 399, 402, 84 S.Ct. 454, 11 L.Ed.2d 430, 433, holding that compulsory designation of a candidate's race on the ballot is unlawful. The designation placed "the power of the State behind a racial classification that induces racial prejudice at the polls."

Bolling v. Sharpe, 1954, 347 U.S. 497, 74 S.Ct. 693, 98 L. Ed. 884, provides further evidence of the breadth of the right recognized in *Brown*. There, because the case concerned the District of Columbia, the Court had to rely on the due process clause of the Fifth Amendment instead of the equal protection clause of the Fourteenth Amendment. Going beyond any question of psychological harm or of the denial of equal educational opportunities to the individual, the Court concluded that racial classifications in public education are so unreasonable and arbitrary as to violate due process:[79]

[78] E.g., Schiro v. Bynum, 375 U.S. 395 (1964) (municipal auditoriums); Johnson v. Virginia, 373 U.S. 61 (1963) (court-rooms); State Athletic Comm'n v. Dorsey, 395 U.S. 533 (1959) (athletic contests); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (public parks and golf courses); Gayle v. Browder, 352 U.S. 903 (intrastate busses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (municipal golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (public beaches and bathhouses). Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954) (municipal amphitheater). For lower court decisions to the same effect, see cases collected in Emmerson and Huber, Political and Civil Rights in the United States 1678 (1967).

[79] See Cahn, Jurisprudence, 30 N.Y.U.L. Rev. 150, 155 (1955). Cf. Antieau, Equal Protection Outside the Clause, 40 Cal. L. Rev. 362, 364 (1954); Pollak, Racial Discrimination and Judicial Integrity, 108 U. Pa. L. Rev. 1, 27-28 (1959).

> "Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. *Segregation in public education is not reasonably related to any proper governmental objective,* and thus it imposes on Negro children . . . a burden that constitutes an arbitrary deprivation of their liberty." 347 U. S. at 498. (Emphasis added.)

As in the jury exclusion cases, when the classification is not "reasonably related to any proper governmental objective" equal protection and due process merge.

If *Brown* has only the narrow meaning *Briggs* gives it, the system of state-sanctioned segregated schools will continue indefinitely with only a little token desegregation. White school boards, almost universal in this circuit, will be able to continue to say that their constitutional duty ends when they provide relief to the particular Negro children who, as individuals, claim their personal right to be admitted to white schools. If the *Briggs* thinking should prevail, the dual system will, for all practical purposes, be maintained: white school officials in most key positions at the state and county levels; Negro faculties in Negro schools, white faculties in white schools; no white children or only a few white children of way-out parents in Negro schools; a few Negroes in some white schools; at best, tokenism in certain school districts.

Brown's broad meaning, its important meaning, is its revitalization of the national constitutional right the Thirteenth, Fourteenth, and Fifteenth Amendments created in favor of Negroes. This is the right of Negroes to *national* citizenship, their right as a class to share the privileges and immunities only white citizens had enjoyed as a class. *Brown* erased *Dred Scott*, used the Fourteenth Amendment to breathe life into the Thirteenth, and wrote the Declaration of Independence into the Constitution. Freedmen are free men. They are created as equal as are all other American citizens and with the same unalienable rights to life, liberty, and the pursuit of happiness. No longer "beings of an inferior race"—the *Dred Scott* article of faith—Negroes too are part of "the people of the United States".

A primary responsibility of federal courts is to protect nationally created constitutional rights. A duty of the States is to give effect to such rights—here, by providing equal educational opportunities free of any compulsion that Negroes wear a badge of slavery. The States owe this duty to Negroes, not just because every citizen is entitled to be free from arbitrary discrimination as a heritage of the common law or because every citizen may look to his state for equal protection of the rights a state grants its citizens. As Justice Harlan clearly saw in the *Civil Rights Cases* (1883), 109 U. S. 3, 3 S.Ct. 18, 27 L.Ed. 835, *the Wartime Amendments created an affirmative duty that the States eradicate all relics, "badges and indicia of slavery" lest Negroes as a race sink back into "second-class" citizenship.*

B. The factual situation dealt with in *Bell v. School City of Gary*, N. D. Ind. 1963, 213 F. Supp. 819, *aff'd* 7 Cir. 1963, 324 F.2d 209, *cert. den'd* 377 U. S. 924 (1964) is not the situation the Supreme Court had before it in *Brown* or that we deal with in this circuit. *Brown* dealt with state-imposed segregation based on dual attendance zones. *Bell* involved nonracially motivated de facto segregation in a school system based on the neighborhood single zone system. In *Bell* the plaintiffs alleged that the Gary School Board had deliberately gerrymandered school attendance zones to achieve a segregated school system in violation of its "duty to provide and maintain a racially integrated system". On the showing that the students were assigned and boundary lines drawn based upon reasonable nonracial criteria, the court held that the school board did not deliberately segregate the races; the racial balance was attributable to geographic and housing patterns. The court analyzed the problem in terms of state action rather than in terms of the Negroes' right to equal educational opportunities. Finding no state action the court concluded that *Brown* did not apply. In effect, the court held that de facto segregated neighborhood schools must be accepted. At any rate, the court said, "states do not have an affirmative duty to provide an integrated education". The Seventh Circuit affirmed.

We must assume that Congress was well aware of the fact that *Bell* was concerned with de facto segregated neighborhood schools—only. Notwithstanding the broad language of the opinion relating to the

lack of a duty to integrate, language later frequently quoted by Senator Humphrey and others in the debates on the Civil Rights Act of 1964, Congress went only so far as to prohibit cross-district bussing and cross-district assignment of students.

The facts, as found by the Court in *Bell*, favored the Gary School Board. Other courts, on very similar facts, have decided that there are alternatives to acceptance of the status quo.[80] A commentator on the subject has fairly summed up the cases: "Using *Brown* as a governing principle, racial imbalance caused by racially motivated conduct is clearly invalid. When racial imbalance results fortuitously, there is a split of authority."[81]

[80] "The central constitutional fact is the inadequacy of segregated education. . . . The educational system that is thus compulsory and public afforded must deal with the inadequacy arising from adventitious segregation; it cannot accept and indurate segregation on the ground that it is not coerced or planned but accepted." Branche v. Board of Education, 204 F.Supp. at 153. See Wright, Public School Desegregation: Legal Remedies for De Facto Segregation, 40 N.Y.U.L. Rev. 285, 301 (1965); Fiss, 78 Harv. L. Rev. 564, 609 (1965) (a relative approach); Sedler, School Segregation in the North and West: Legal Aspects, 7 St. Louis L. Rev. 228, 233-239, 275 (1963); Maslow, De Facto Public School Segregation, 6 Vill. L. Rev. 353 (1961).

[81] King, Racial Imbalance in the Public Schools, 18 Vand. L. Rev. 1290, 1337 (1965). Webb v. Board of Education of Chicago, N.D.Ill. 1963, 223 F.Supp. 466; Deal v. Cincinnati Board of Education, S.D.Ohio 1965, 244 F.Supp. 572; Lynch v. Kenston School District, N.D.Ohio 1964, 229 F.Supp. 740; Downs v. Board of Education, 10 Cir. 1965, 336 F.2d 988, cert. denied 380 U.S. 914, 85 S.Ct. 898, 13 L.Ed. 2d 800; and Sealy v. Department of Public Instruction of Pennsylvania, 3 Cir. 1958, 252 F.2d 898, are more or less in agreement with *Bell*. These cases usually rely on the school board's good faith, lack of racial motivation, and the propriety of considering transportation, geography, safety, access roads, and other neutral criteria as rational bases for school districting. Taking the contrary position are: Booker v. Board of Education of Plainfield, 1965, 45 N.J. 161, 212 A.2d 1; Branche v. Hempstead, E.D.N.Y. 1962, 204 F.Supp. 150; Blocker v. Board of Education of Manhasset, E.D.N.Y. 1964, 226 F. Supp. 208, 229 F.Supp. 709; Barksdale v. Springfield School Committee, D.Mass. 1965, 237

Barksdale v. Springfield School Committee, D. Mass. 1965, 237 F. Supp. 543, similar on the facts to *Bell*, holds squarely contrary to *Bell*:

> "The defendants argue, nevertheless, that there is no constitutional mandate to remedy racial imbalance. Bell v. School City of Gary, 324 F.2d 209 (7th Cir. 1963). But that is not the question. *The question is whether there is a constitutional duty to provide equal educational opportunities for all children within the system.* While Brown answered that question affirmatively in the context of coerced segregation, the constitutional fact—the inadequacy of segregated education—is the same in this case, and I so find. . . . *This is not to imply that the neighborhood school policy per se is unconstitutional, but that it must be abandoned or modified when it results in segregation in fact.*

F.Supp. 543, vacated for other reasons 1 Cir. 1965, 348 F.2d 261; Jackson v. Pasadena City School District, 1962, 59 Cal. 2d 876, 31 Cal. Rept. 606, 382 P.2d 878. School authorities may act to offset racial imbalance: See Addabbo v. Donovan, 256 N.Y.S. 2d 178, aff'd 261 N.Y.S.2d 68, 209 N.E.2d 112 (1965), *cert. den'd* 382 U.S. 905 (1965). See also Balaban v. Rubin, 248 N.Y.S.2d 574, aff'd 250 N.Y.2d 281, 199 N.E.2d 375 (1964), *cert. den'd* 379 U.S. 881 (1964) (Board may "take into consideration the ethnic composition of the children" before drawing the attendance lines for a new school); Olson v. Board of Education, E.D.N.Y. 1966, 250 F. Supp. 1000 (the Princeton plan—see note 124, infra); Offerman v. Nitkowski, W.D. N.Y. 1965, 248 F.Supp. 129; Guida v. Board of Education of New Haven, 26 Conn. Supp. 121, 213 A.2d 843 (1965); Strippoli v. Bichal, 250 N.Y.S.2d 969, aff'd N.Y.S.2d 84, 209 N.E.2d 123 (1965) (bussing); Morean v. Board of Education, 42 N.J. 237, 200 A.2d 97 (1965); Vetere v. Allen, 258 N.Y. 77, 206 N.E. 2d 174 (1965) (redistricting of attendance zone approved because "racial balance is essential to a sound education"); Van Bierkom v. Donovan, 1965, 15 N.Y.2d 399, 259 N.Y.S.2d 825, 207 N.E.2d 503.

> . . . I cannot accept the view in *Bell* that only forced segregation is incompatible with the requirements of the Fourteenth Amendment, *nor do I find meaningful the statement that '[t]he Constitution . . . does not require integration. It merely forbids discrimination.'* 324 F.2d at 213. . . . ¶ This court recognizes and reiterates that the problem of racial concentration is an educational, as well as constitutional, problem and, therefore, orders the defendants to present a plan no later than April 30, 1965, *to eliminate to the fullest extent possible* racial concentration in its elementary and junior high schools within the framework of effective educational procedures, as guaranteed by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States." (Emphasis added.)

"In short, *Barksdale* [does not analyze *Brown*] in terms of propriety of school board action, but proceeds in terms of a right on the part of Negro students to an equal educational opportunity, which in light of the ruling in *Brown* that separate schools are inherently unequal, must perforce be a right to an integrated educational setting."[32] On appeal, the First Circuit accepted the district court's findings of fact but vacated the order with directions to dismiss without prejudice because the school board, on its own

[32] Gilmor and Gosule, Duty to Integrate Public Schools? Some Judicial Responses and a Statute, 46 Bost. U. L. Rev. 45, 57 (1966).

initiative, had taken action identical with the court-ordered action. 348 F.2d 261. The Court noted a difference between "the seeming absolutism" of the opinion and the less sweeping order "to eliminate [segregation] to the fullest extent possible . . . within the framework of effective educational procedures".[83] Taking both opinions together, they recognize that "the state would not be permitted to ignore the problem of de facto segregation. The holding in *Brown*, unexplained by its underlying reasoning, requires no more than the decision in *Bell*, but when illuminated by the reasoning, it permits the result in *Barksdale* and may require that result."[84] At the very least, as the *Barksdale* court saw it, there is a duty to integrate in the sense that integration is an educational goal to be given a high, high priority among the various considerations involved in the proper administration of a system beset with de facto segregated schools.

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[83] The First Circuit construed the court's order as not calling for "an absolute right in the plaintiffs to have what the court found to be 'tantamount to segregation' removed at all costs." At the same time, the Court said: "Rather we take it to determine that . . . racial imbalance disadvantages Negro students and impairs their educational opportunities as compared with other races to such a degree that they have a right to insist that the defendants consider their special problems along with all other relevant factors when making relevant decisions." Springfield School Committee v. Barksdale, 1965, 348 F.2d 261, 264.

[84] Gillmor and Gosule supra note 82, at 64. Compare the statement of policy in the Massachusetts statute, An Act Providing for the Elimination of Racial Imbalance in the Public Schools (Mass. Acts. 1965, ch. 651):

> It is hereby declared to be the policy of the commonwealth to encourage all school committees to adopt as educational objectives the promotion of racial balance and the correction of existing racial imbalance in the public schools. The prevention or elimination of racial imbalance shall be an objective in all decisions involving the drawing or altering of school attendance lines and the selection of new school sites.

The statute was enacted a month after *Barksdale* was decided.

Although *Brown* points toward the existence of a duty to integrate de facto segregated schools,[85] the holding in *Brown*, unlike the holding in *Bell* but like the holdings in this circuit, occurred within the context of state-coerced segregation. The similarity of pseudo de facto segregation in the South to actual de facto segregation in the North is more apparent than real. Here school boards, utilizing the dual zoning system, assigned Negro teachers to Negro schools and selected Negro neighborhoods as suitable areas in which to locate Negro schools. Of course the concentration of Negroes increased in the neighborhood of the school. Cause and effect came together. In this circuit, therefore, the location of Negro schools with Negro faculties in Negro neighborhoods and white schools in white neighborhoods cannot be described as an unfortunate fortuity: It came into existence as state action and continues to exist as racial gerrymandering, made possible by the dual system.[86] Segregation resulting from racially motivated gerryman-

[85] "Some of the Supreme Court's language in *Brown* can apply to this type of segregation as well as to that before the Court, since this type of imbalance may also 'generate a feeling of inferiority as to [the Negro children's] status in the community that may affect their hearts and minds in a way unlikely ever to be undone.' Thus, if one believes that the basis of the *Brown* decision was the Court's finding that separate schools were unconstitutional simply because they bred a feeling of inferiority in the Negro, one must also believe that the neighborhood school must also be unconstitutional if it breeds the same feeling of inferiority." Kaplan, Segregation Litigation and the Schools—Part 1, The New Rochelle Experience 58 NW U. L. Rev. 1, 21 (1964). "Necessarily implied in [Brown's] . . . proscription of segregated education was the positive duty of eliminating it." Taylor v. Board of Education of the City of New Rochelle, S.D.N.Y. 1961, 191 F. Supp. 181, 193, aff'd 294 F.2d 36, *cert. denied* 368 U.S. 940.

[86] See Clemons v. Board of Education of Hillsboro, 6 Cir. 1956, 228 F.2d 853, cert. den'd 350 U.S. 1000 (1956). Cf. Gomillion v. Lightfoot, 1960, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110.

dering is properly characterized as "de jure" segregation. See *Taylor v. Board of Education of the City of New Rochelle,* S.D.N.Y. 1961, 191 F. Supp. 181.[87] The courts have had the power to deal with this situation since *Brown I.* In *Holland v. Board of Public Instruction of Palm Beach County,* 5 Cir. 1958, 258 F.2d 730, although there was no evidence of gerrymandering as such, the court found that the board "maintained and enforced" a completely segregated system by using the neighborhood plan to take advantage of racial residential patterns. See also *Evans v. Buchanan,* D.Del. 1962, 207 F. Supp. 820, where, in spite of a genuflexion in the direction of *Briggs,* the Court found that there was gerrymandering of school districts superimposed on a pre-*Brown* policy of segregation.

C. The defendants err in their contention that the HEW and the courts cannot take race into consideration in establishing standards for desegregation "The Constitution is not this color-blind."[88]

The Constitution is both color blind and color conscious. To avoid conflict with the equal protection

[87] Modified plan approved, 195 F.Supp. 231, *aff'd* 2 Cir. 1961, 294 F.2d 36, cert. den'd 368 U.S. 940 (1961). See Kaplan, Segregation Litigation and the Schools—Part 1; The New Rochelle Experience, 58 NW.U. L. Rev. 1 (1964). Jackson v. School Board of the City of Lynchburg, W.D. Va. 1962, 203 F.Supp. 701; Dowell v. School Board of Oklahoma City Public Schools, W.D. Okla. 1965, 244 F.Supp. 971; and Swann v. Charlotte-Mecklenburg Board of Education, W.D.N.C. 1965, 243 F.Supp. 667, followed *Taylor* on the unconstitutionality of racial gerrymandering. See also Jackson v. Pasadena City School District, 1963, 59 Cal.2d 876, 382 P.2d 878; Clemons v. Board of Education of Hillsboro, 6 Cir. 1956, 228 F.2d 853, *cert. den'd* 350 U.S. 106 (1956); Fuller v. Volk, 3 Cir. 1965, 351 F.2d 323.

[88] Taylor v. Board of Education of the City of New Rochelle, S.D.N.Y. 1961, 191 F.Supp. 181, 196, *aff'd* 294 F.2d 36 (Kaufman, J.).

clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate governmental purpose. For example, jury venires must represent a cross-section of the community. *Strauder v. West Virginia*, 1880, 100 U.S. 303, 25 L.Ed. 664. The jury commissioners therefore must have a "conscious awareness of race in extinguishing racial discrimination in jury service". *Brooks v. Beto*, 5 Cir. 1966, 366 F.2d 1. Similarly, in voter registration cases we have used the "freezing principle" to justify enjoining the use of a constitutional statute where, in effect, the statute would perpetuate past racial discrimination against Negroes. *United States v. Louisiana*, E.D. La. 1963, 225 F.Supp. 353, aff'd 1965, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 817. "[I]t is unrealistic to suppose that the evils of decades of flagrant race discrimination can be overcome by purging registration rolls of white voters. . . . [U]nless there is some appropriate way to equalize the present with the past, the injunctive prohibitions even in the most stringent, emphatic, mandatory terms prohibiting discrimination in the future, continues for many years a structure committing effectual political power to the already registered whites while excluding Negroes from this vital activity of citizenship." *United States v. Ward*, 5 Cir. 1965, 349 F.2d 795, 802. "An appropriate remedy . . . should undo the results of past discrimination as well

as prevent future inequality of treatment." *United States v. Duke,* 5 Cir. 1964, 332 F.2d 759, 768. If the Constitution were absolutely color-blind, consideration of race in the census and in adoption proceedings would be unconstitutional.

Here race is relevant,[89] because the governmental purpose is to offer Negroes equal educational opportunities. The means to that end, such as disestablishing segregation among students, distributing the better teachers equitably, equalizing facilities, selecting appropriate locations for schools, and avoiding resegregation must necessarily be based on race. School officials have to know the racial composition of their school populations and the racial distribution within the school district. The Courts and HEW cannot measure officials' good faith or progress without taking race into account. "When racial imbalance infects a public school system, there is simply no way to alleviate it without consideration of race. . . . There is no constitutional right to have an inequality

[89] "The justification for the school board's incorporation of racial distinctions in its correctional scheme is that race is a relevant characteristic, given the school board's purpose, which is to avoid psychological injury to the Negro child, break down social barriers, and mitigate the academic inadequacy of the imbalanced schools. Of course, it might be argued that many of the evils the school board attempts to eliminate when it takes correctional steps are not attributable to the race of the individuals within the imbalanced school, but instead are attributable to their social class. Yet, certain of these evils are uniquely related to the fact that the imbalance is a racial one; namely, those attributable to the personal impact of the imbalance on the Negro. Moreover, most Negroes in the ghetto, and hence attending an imbalanced school, are members of the lowest economic class, and thus the board's remedial measures will tend to cure the social imbalance as well." Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 Harv. L. Rev. 564, 577-78 (1965).

perpetuated."[20] Judge Sobeloff's answer in *Wanner v. County School Board of Arlington County*, 4 Cir. 1966, 357 F.2d 452, 454-55, is our answer in this case:

> "If a school board is constitutionally forbidden to institute a system of racial segregation by the use of artificial boundary lines, it is likewise forbidden to perpetuate a system that has been so instituted. It would be stultifying to hold that a board may not move to undo arrangements artificially contrived to effect or maintain segregation, on the ground that this interference with the status quo would involve 'consideration of race.' When school authorities, recognizing the historic fact that existing conditions are based on a design to segregate the races, act to undo these illegal conditions—especially conditions that have been judicially condemned—their effort is not to be frustrated on the ground that race is not a permissible consideration. This is not the 'consideration of race' which the Constitution discountenances. . . . There is no legally protected vested interest in segregation. If there were, then Brown v. Board of Education and the numerous decisions based on that case would be pointless. Courts will not say in one breath that public school systems may not practice segregation, and in the next that they may do nothing to eliminate it."

[20] Wright, Public School Desegregation: Legal Remedies for De Facto Segregation, 16 West. Res. L. Rev. 478, 489 (1965).

D. Under *Briggs's* blessing, school boards throughout this circuit first declined to take any affirmative action that might be considered a move toward integration. Later, they embraced the Pupil Placement Laws as likely to lead to no more than a little token desegregation. Now they turn to freedom of choice plans supervised by the district courts. As the defendants construe and administer these plans, without the aid of HEW standards there is little prospect of the plans' ever undoing past discrimination or of coming close to the goal of equal educational opportunities. Moreover, freedom of choice, as now adminstered, necessarily promotes resegregation. The only relief approaching adequacy is the conversion of the still-functioning dual system to a unitary, non-racial system—lock, stock, and barrel.

If this process be "integration" according to the 1955 *Briggs* court, so be it. In 1966 this remedy is the relief commanded by *Brown*, the Constitution, the Past, the Present, and the wavy fore-image of the Future.

IV.

We turn now to the specific provisions of the Civil Rights Act on which the defendants rely to show that HEW violates the Congressional intent. These provisions are the amendments to Title IV and VI added in the Senate. The legislative history of these amend-

ments is sparse and less authoritative than usual because of the lack of committee reports on the amended version of the bill.

A. Section 401(b) defines desegregation:

> " 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

The affirmative portion of this definition, down to the "but" clause, describes the assignment provision necessary in a plan for conversion of a de jure dual system to a unitary, integrated system. The negative portion, starting with "but", excludes assignment to overcome racial imbalance, that is, acts to overcome de facto segregation. As used in the Act, therefore, "desegregation" refers only to the disestablishment of segregation in de jure segregated schools. Even if a broader meaning should be given to "assignment . . . to overcome racial imbalance", Section 401 would not mean that such assignments are unlawful:

> "The intent of the statute is that no funds and no technical assistance will be given by the United States Commissioner of Education with respect to plans for the assignment of students to public schools in order to over-

> come racial imbalance. The statute may not be interpreted to mean that such assignment is illegal or that reasonable integration efforts are arbitrary or unlawful."[91]

The prohibition against assignment of students to overcome racial imbalance was added as an amendment during the debates in the House to achieve the same result as the anti-bussing provision in section 407. Some of the difficulty in understanding the Act and its legislative history arises from the statute's use of the undefined term "racial imbalance". It is clear however from the hearings and debates that Congress equated the term, as do the commentators, with "de facto segregation" that is, non-racially motivated segregation in a school system based on a single neighborhood school for all children in a definable area.[92] Thus, Congressman William Cramer

[91] Addabbo v. Donovan, 22 App. Div.2d 383, 256 N.Y.S.2d 178, 184, (2d Dept. 1965), aff'd, 16 N.Y.2d 619, 261 N.Y.S.2d 68, 209 N.E.2d 112 (1965), cert. denied, 382 U.S. 905 (1965).

[92] For example, "Racial imbalance" and "de facto segregation" are "used synonymously . . . [to] refer to a situation where a school is predominantly composed of Negro students not as a result of state action but rather as the end product of segregated housing and adherence to the neighborhood school plan." Gillmor and Gosule, 46 Boston U. L. Rev. 45, 46 (1966). The term "de facto segregation" has become accepted as denoting non-racially motivated separation of the races as opposed to "de jure segregation" denoting deliberate separation of the races by law. Since segregation is unconstitutional, each is a contradiction in terms. One student of the problem has pointed out, "The term *de facto* segregation makes the racially imbalanced school appear . . . [to be] the Northern counterpart of segregated education under Jim Crow laws . . . . As such the term distorts reality and paralyzes thought. [Racial] imbalance is frequently labeled 'de facto' segregation to suggest that the requisite governmental involvement cannot be found." Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 Harv. L. Rev. 564, 566, 584 (1965). Another has said, "As a more accurate term, racial im-

who offered the amendment, was concerned that the bill as originally proposed might authorize the government to require bussing to overcome de facto segregation. In explaining the amendment, he said:

> "In the hearings before the committee I raised questions on 'racial imbalance' and in the sub-committee we had lengthy discussions in reference to having these words stricken in the title, as it then consisted, and to strike out the words '*racial imbalance*' proposed by the administration. ¶ The purpose is *to prevent any semblance of congressional acceptance or approval of the concept of 'de facto' segregation* or to include in the definition of 'desegregation' *any balancing of school attendance by moving students across school district lines to level off percentages where one race outweighs another.*"

The neighborhood school system is rooted deeply in American culture.[93] Whether its continued use is

balance will be used to denote fortuitous racial separation in the public schools". King, Racial Imbalance in the Public Schools: Constitutional Dimensions and Judicial Response, 18 Vand. L. Rev. 1290, 1291 (1965).

"*De facto* segregation has become the short way of describing the existing situation in northern cities. . . . a school system which is marked by a very high proportion of Negroes in some of its schools, and few or none in others, but in which this separation has taken place without the compulsion of a state law or officially announced policy requiring that Negro and white children be placed in separate schools." Hyman and Newhouse, Desegregation of the Schools: The Present Legal Situation, 14 Buff. L. Rev. 208, 221 (1964). See also Carter, De Facto Segregation, 16 West. Res. L. Rev. 502, 503 (1965).

[93] The rationale of the neighborhood school system is that the school serves as the educational, recreational, and cultural center of the community. See Hansen, The Role of Educators, 34 Notre Dame L. Rev. 652, 654 (1959). Proponents of the view that neighborhood schools may become so racially imbalanced as to

constitutional when it leads to grossly imbalanced schools is a question some day to be answered by the Supreme Court, but that question is not present in any of the cases before this Court. As noted in the previous section of this opinion, we have many instances of a heavy concentration of Negroes or whites in certain areas, but always that type of imbalance has been superimposed on total school separation. And always the separation originally was racially motivated and sanctioned by law in a system based on two schools within a neighborhood or overlapping neighborhoods, each school serving a different race. The situations have some similarity but they have different origins, create different problems, and require different corrective action.[94]

In the 1964 Act (and again in 1966 during consideration of amendments to the Elementary and Secondary Education Act of 1965) Congress, within the con-

require affirmative corrective action point out: "The modern-day neighborhood school cannot be equated with the common school of yesteryear—the latter constitutes America's ideal of a democratic institution—a single structure serving a heterogeneous community in which children of varied racial, cultural, religious, and socio-economic backgrounds were taught together—the proverbial melting pot. Because of rigid racial and socio-economic stratification, ethnic and class similarity has become the most salient present-day neighborhood characteristic, particularly in urban areas. The neighborhood school, which encompasses a homogeneous racial and socio-economic grouping, as is true today, is the very antithesis of the common school heritage." Carter, De Facto School Segregation: An Examination of the Legal and Constitutional Questions Presented, 16 West. Res. L. Rev. 502, 507 (1965). See also Sedler, School Segregation in the North and West: Legal Aspects, 7 St. Louis U. L. J. 228, 252-56 (1963).

[94] For some idea of the number and complexity of the administrative problems school officials face in dealing with de facto segregation, see Kaplan, Segregation Litigation and the Schools—Part II: The General Northern Problem, 58 NW. U. L. Rev. 157, 182-186 (1963). Professor Kaplan quotes at length excerpts from the testimony in *Bell*.

text of debates on aid to de facto segregated schools declined to decide just what should be done about imbalanced neighborhood schools.[94a] The legislative solution, if there is one to this problem, will require a carefully conceived and thoroughly debated comprehensive statute. In the 1964 Act Congress simply directed that the federal assistance provided in Title IV, §403-5 was not to be used for developing plans to assign pupils to overcome racial imbalance.[95] Similarly, Congress withheld authorizing the Attorney General, in school desegregation actions, to ask for a court order calling for bussing pupils from one school to another to "achieve a racial balance".[96]

[94a] The question of providing special, ear-marked federal funds for school districts that were trying to correct imbalanced neighborhood schools came up again in connection with the 1966 amendments to the Elementary and Secondary Education Act of 1965. The House committee recommended special priority for applications under Title III of the Act from local school districts which sought help with problems of overcrowding, obsolescence, or racial imbalance. The House withdrew priority for dealing with problems of racial imbalance and added an amendment to Section 604 of the Act to the effect that nothing in the Act be construed to "require the assignment or transportation of students or teachers in order to overcome racial imbalance." The Senate went along with both actions. The debate makes clear that Congress was once again talking about racial imbalance in the context of de facto, not de jure, school segregation. See particularly Congressional Record, October 6, 1966, pp. 24538-9; 24541-3. See also 1966 U.S. Code Congressional and Administrative News, No. 11, pp. 5089-90, for language in House committee report recommending the priority position of applications to deal with racial imbalance.

[95] Congressman Cramer's amendment.

[96] This restriction appears in §407 of the Act. In its context it seems clearly to restrict the Attorney General to requesting only such relief as is constitutionally compelled. In other words, the Act is *not* to be construed as authorizing a statutory duty to reduce imbalance by bussing. Certainly the language of §407 does not call for a construction that prohibits a court order directing that school boards abandon racially discriminatory practices which violate the Constitution. Nor does it suggest that the Attorney General is precluded from requesting court orders to end racial imbalance resulting from unconstitutional practices.

B. Section 407(a)(2) of Title IV authorizing the Attorney General to file suit to desegregate, contains the "anti-bussing" proviso:

> ". . . nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial compliance with constitutional standards."

First, it should be noted that the prohibition applies only to transportation; and only to transportation across school lines to achieve racial balance. The furnishing of transportation as part of a freedom of choice plan is not prohibited. Second, the equitable powers of the courts exist independently of the Civil Rights Act of 1964. It is not contended in the instant cases that the Act conferred new authority on the courts. And this Court has not looked to the Act as a grant of new judicial authority.

Section 407(a)(2) might be read as applying only to orders issued in suits filed by the Attorney General under Title IV. However, Senator, now Vice President Humphrey, Floor Manager in the Senate, said it was his understanding that the provision applied to the entire bill. In particular, he said that it applies to any refusal or termination of federal assistance under Title VI since the procedure for doing so requires an order approved by the President. Senator Humphrey explained:

"This addition seeks simply to *preclude an inference that the title confers new authority to deal with 'racial imbalance' in schools,* and should serve to soothe fears that Title IV might be read to empower the Federal Government to order the bussing of children around a city in order to achieve a certain racial balance or mix in schools. ¶ Furthermore, a new section 410 would explicitly declare that 'nothing in this title shall prohibit classification and assignment for reasons other than race, color, religion, or national origin.' ¶ Thus, classification along *bona fide neighborhood school lines,* or *for any other legitimate reason* which local school boards might see fit to adopt, would not be affected by Title IV, so long as such classification was bona fide. Furthermore, this amendment makes clear that the only Federal intervention in local schools will be for the purpose of preventing denial of equal protection of the laws." (Emphasis added.)

Senator Humphrey spoke several times in the language of *Briggs* but his references to *Bell* indicate that the restrictions in the Act were pointed at the Gary, Indiana de facto type of segregation. Senator Byrd (West Virginia) asked Senator Humphrey would he give assurance "that under Title VI school children may not be bussed from one end of the community to another end of the community at taxpayers' expense to relieve so-called racial imbalance in the schools". Senator Humphrey replied:

> "I do . . . That language is to be found in Title IV. The provision [§407(a)(2)] merely quotes the substance of a recent court decision which I have with me, and which I desire to include in the Record today, the so-called Gary case."

Senator Humphrey explained:

> "Judge Beamer's opinion in the *Gary* case is significant in this connection. In discussing this case, as we did many times, it was decided to write the *thrust of the court's opinion* into the proposed substitute." (Emphasis added.)

The thrust of the *Gary* case (*Bell*) was that if school districts were drawn without regard to race, but rather on the basis of such factors as density of population, travel distances, safety of the children, costs of operating the school system, and convenience to parents and children, those districts are valid even if there is a racial imbalance caused by discriminatory practices in housing. Thus, continuing his explanation, Senator Humphrey said:

> "The bill does not attempt to integrate the schools, but it does attempt to eliminate segregation in the schools. The natural factors, such as density of population, and the distance that students would have to travel are considered legitimate means to determine the validity of a school district, *if the school districts are not gerrymandered, and in effect*

deliberately segregated. The fact that there is a racial imbalance per se is not something which is unconstitutional. That is why we have attempted to clarify it with the language of Section 4." (Emphasis added.)

C. Section 601 states the general purpose of Title VI of the Act:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, *be denied the benefits of,* or be subjected to discrimination under any program or activity receiving Federal financial assistance." (Emphasis added.)

This is a clear congressional statement that racial discrimination against the beneficiaries of federal assistance is unlawful. Children attending schools which receive federal assistance are of course among the beneficiaries. In the House, Congressman Celler explained:

"The legality is based on the general power of Congress to apply reasonable conditions. . . ¶In general, it seems rather anomalous that the Federal Government should aid and abet discrimination on the basis of race, color or national origin by granting money and other kinds of financial aid. It seems rather shocking, moreover, that while we have on the one hand the 14th amendment, which is supposed to do away with discrimination since it pro-

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> vides for equal protection of the laws, on the other hand, we have the Federal Government aiding and abetting those who persist in practicing racial discrimination."

In the Senate, Senator Javits, an assistant floor-manager, expressed concern as to the clarity of the statement of policy:

> "I ask the Senator whether we now have a clear understanding that if title VI shall be enacted as it is now proposed, the express and clear policy of Congress against aiding discrimination will prevail . . ."

Senator Humphrey answered:

> "Some Federal agencies appear to have been reluctant to act in this area. Title VI will require them to act. Its enactment will thus serve to insure uniformity and permanence to the nondiscrimination policy."[97]

D. Section 604 of the Act, 42 U.S.C. § 2000d—3 is the section the defendants principally rely upon and the section most misunderstood.[97] It provides:

> "Nothing contained in this title shall be construed to authorize action under this title by any department or agency *with respect to any employment practice of any employer* employment agency, or labor organization ex-

[97] See Hearings Before the Committee on Rules, House of Representatives, 89 Cong. 2nd Sess., on H. Rep., 826, Sept. 29-30, 1966, 24-26, 37-40.

> cept where a primary objective of the Federal financial assistance is to provide employment." (Emphasis added.)

The defendants contend that this section bars any action requiring desegregation of faculties and school personnel.

Section 604 was not a part of the original House bill. Senator Humphrey, while introducing the Act explained: "[The] Commissioner might also be justified in requiring elimination of racial discrimination in employment or assignment of teachers, at least where such discrimination affected the educational opportunities of students. See *Braxton v. Board of Public Instruction of Duval County*, 5 Cir. 1964, 326 F.2d 616." 110 Cong.Rec. p. 6345. That was in March 1964. In June 1964, in explaining the amendments, Senator Humphrey said, "This provision is in line with the provisions of section 602[98] and serves to spell out more precisely the declared scope of coverage of the title." In the same speech he stated (110 C.R. 12714): "We have made no changes of substance in Title VI." This explanation plainly indicates that the amendment was not intended as a statutory bar to faculty integration in schools receiving federal aid.

However, in the interval between these two explanations the Attorney General, in response to a letter from Senator Cooper, stated that Section 602 would not apply to federally aided employers who discriminated in employment practices: "Title VI is limited . . . to discrimination against the beneficiaries of

[98] See footnote 19.

federal assistance programs. . . . Where, however, employees are the intended beneficiaries of a program, Title VI would apply".[99] He gave as an example accelerated public works programs. It was after the receipt of the Attorney General's letter that the amended Senate bill was passed. The school boards argue therefore that Section 604 was enacted, because of the Attorney General's interpretation, to exclude interference with employment practices of schools.

In its broadest application this argument would allow racial discrimination in the hiring, discharge, and assignment of teachers. In its narrowest application this argument would allow discrimination in hiring and discharging but not in assigning teachers, an inexplicable anomaly.[100] There is no merit to this argument. Section 604 and the Attorney General's letter are not inconsistent, since under Section 601 it is the school children, not the teachers (employees), who are the primary beneficiaries of federal assistance to public schools. Faculty integration is essential to student desegregation. To the extent that teacher discrimination jeopardizes the success of desegregation, it is unlawful wholly aside from its effect upon individual teachers.

After Section 601 was proposed, additional clarifying language was suggested to make it clear that discrimination in certain employer-employee relationships, not affecting the intended beneficiaries of the program, would be excluded from the reach of the

[99] BNA Operations Manual, The Civil Rights Act of 1964, p. 289.
[100] See Note, Desegregation of Public School Activities, 51 Iowa L. Rev. 681, 690-96 (1966).

statute. See Hearings, H.R. Comm. on Rules, H. R. 7152, 88th Cong., 2d Sess. (1964), pp. 94, 226; 110 C.R. 6544-46 (Senator Humphrey). For example, there was a serious question as to whether the bill would forbid a farmer who was receiving benefits under the Agricultural Adjustment Act from discriminating upon the basis of race in the selection of his employees. Hearings, H.R. Comm. on Rules, H. R. 7152, 88 Cong., 2d Sess., 1964, p. 94, 110 C.R. 6545 (Senator Humphrey). The addition of Section 604 to the bill as originally proposed clearly excluded the application of the Act to this type of situation. Congress did not, of course, intend to provide a forum for the relief of individual teachers who might be discriminatorily discharged; Congress was interested in a general requirement essential to success of the program as a whole.[101]

Collaterally to their argument on Section 604, the defendants cite Section 701(b) of Title VII, covering Equal Employment Opportunities, which specifically excepts a "state or political subdivision thereof". This section has no application to schools. Section 701(b), defines "employer" as "a person engaged in an industry affecting commerce who has twenty-five or more employees. . . ."

[101] Senator Humphrey explained: The "elimination of racial discrimination in employment or assignment of teachers . . . does not mean that Title VI would authorize a federal official to prescribe [particular] pupil assignments, or to select a [particular] faculty as opponents of the bill have suggested. The only authority conferred would be authority to adopt, with the approval of the President, a general requirement that the local school authority refrain from racial discrimination in treatment of pupils and teachers . . ." 110 Cong. Rec. 6545.

Section 604 was never intended as a limitation on desegregation of schools. If the defendants' view of Section 604 were correct the purposes of the statute would be frustrated, for one of the keys to desegregation is integration of faculty. As long as a school has a Negro faculty it will always have a Negro student body. As the District Court for the Western District of Virginia put it in *Brown v. County School Board of Frederick County*, 1965, 245 F. Supp. 549, 560:

> "[T]he presence of all Negro teachers in a school attended solely by Negro pupils in the past denotes that school a 'colored school' just as certainly as if the words were printed across its entrance in six-inch letters."

As far as possible federal courts must carry out congressional policy. But we must not overlook the fact that "we deal here with constitutional rights and not with those established by statute".[103] The right of Negro students to be free from racial discrimination in the form of a segregated faculty is part of their broader right to equal educational opportunities. The "mandate of *Brown* . . . forbids the [discriminatory] consideration of race in faculty selection just as it forbids it in pupil placement." *Chambers v. Hendersonville City Board of Education*, 4 Cir. 1966, 364 F.2d 189.

In *Brown II* the Supreme Court specifically referred to the reallocation of staff as one of the reasons permitting desegregation "with all deliberate speed".

[103] Smith v. Board of Education of Morrilton, 8 Cir. 1966, 365 F.2d 770, 784.

"In determining the additional time necessary . . . courts may consider problems related to administration, arising from . . . *personnel*. . . ." (Emphasis added.) 349 U.S. at 301. For ten years, however, this Court and other circuit courts[108] had approved district courts' postponing hearings on faculty desegregation. *Bradley v. School Board of the City of Richmond*, 1965, 382 U. S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187 put an end to this practice. In *Bradley* the Supreme Court held that faculty segregation had a direct impact on desegregation plans. The court summarily remanded the case to the district court holding that it was improper for that court to approve a desegregation plan without considering, at a full evidentiary hearing, the impact of faculty allocation on a racial basis. The Court said, "[There is] no merit to the suggestion that relation between faculty allocation on an alleged racial basis and the adequacy of the desegregation plans are entirely speculative." Moreover, "Delays in desegregation of school systems are no longer tolerable." 387 U.S. at 105. In *Rogers v. Paul*, 1965, 382 U.S. 198, 200, 86 S.Ct. 358, 15 L.Ed.2d 265, the Supreme Court held that Negro students in grades not yet desegregated were entitled to an immediate transfer to a white high school. They "plainly had standing" to sue on two theories: (1) "that *racial allocation of faculty denies them equality of educational opportunity without regard to* segregation of pupils, and (2) that it renders inadequate an otherwise constitutional pupil desegregation

[108] For example, Lockett v. Board of Education of Muscogee County, 5 Cir. 1965, 345 F.2d 225, 229; Calhoun v. Latimer, 5 Cir. 1963, 321 F.2d 302, 307; Bradley v. School Board of the City of Richmond, 4 Cir. 1965, 345 F.2d 310, 320.

plan soon to be applied to their grades." In *Singleton II* this Court, relying on *Bradley*, held that it was "essential" for the Jackson schools to make an "adequate start toward elimination of race as a basis for the employment and allocation of teachers, administrators and other personnel." 355 F.2d at 870.

In a recent decision of the Eighth Circuit, *Clark v. Board of Education of Little Rock School District*, No. 18,368, December 15, 1966, the Court required a "positive program aimed at ending in the near future the segregation of the teaching and operating staff". The Court stated: "We agree that faculty segregation encourages pupil segregation and is detrimental to achieving a constitutionally required non-racially operated school system. It is clear that the Board may not continue to operate a segregated teaching staff. . . . It is also clear that the time for delay is past. The desegregation of the teaching staff should have begun many years ago. At this point the Board is going to have to take accelerated and positive action to end discriminatory practices in staff assignment and recruitment."

In *Braxton v. Board of Public Instruction of Duval County*, 1964, 326 F.2d 616, 620, *cert. denied* 377 U. S. 924, the case cited by Senator Humphrey, this Court affirmed an order of the district court prohibiting assignment of "teachers *and other personnel* . . . on a racially segregated basis." In *Smith v. Board of Education of Morrilton*, 8 Cir. 1966, 365 F.2d 770, 778, the Court said:

"It is our firm conclusion that the reach of the Brown decisions, although they specifically concerned only pupil discrimination, clearly extends to the proscription of the employment and assignment of public school teachers on a racial basis. Cf. United Public Workers v. Mitchell, 330 U. S. 75, 100 (1947); Wieman v. Updegraff, 344 U. S. 183, 191-192 (1952). See Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U. S. 714, 721 (1963). This is particularly evident from the Supreme Court's positive indications that non-discriminatory allocation of faculty is indispensable to the validity of a desegregation plan. Bradley v. School Board of the City of Richmond, supra; Rogers v. Paul, supra. This court has already said, 'Such discrimination [failure to integrate the teaching staff] is proscribed by *Brown* and also the Civil Rights Act of 1964 and the regulations promulgated thereunder'. Kemp v. Beasley, supra, p. 22 of 352 F.2d."

In *Wheeler v. Durham City Board of Education*, 4 Cir. 1966, 363 F.2d 738, 740 the Court stated: "We read [*Bradley*] as authority for the proposition that removal of race considerations from faculty selection and allocation is, as a matter of law, an inseparable and indispensable command within the abolition of pupil segregation in public schools as pronounced in *Brown v. Board of Education*, 347 U.S. 483. Hence no proof of the relationship of faculty allocation and pupil assignment was required here. The only factual

issue is whether race was a factor entering into the employment and placement of teachers." In *Wright v. County School Board of Greensville County*, E.D. Va. 1966, 252 F. Supp. 378, 384, holding that a faculty desegregation provision approved by the Commissioner of Education was not sufficient, the court said:

> "The primary responsibility for the selection of means to achieve employment and assignment of staff on a nonracial basis rests with the school board. . . . Several principles must be observed by the board. Token assignments will not suffice. The elimination of a racial basis for the employment and assignment of staff must be achieved at the earliest practicable date. The plan must contain well defined procedures which will be put into effect on definite dates. The board will be allowed ninety days to submit amendments to its plan dealing with staff employment and assignment practices."

In *Kier v. County School Board of Augusta County*, W.D. Va. 1966, 249 F. Supp. 239, 247, the court held that free choice plans require faculty integration:

> "Freedom of choice, in other words, does not mean a choice between a clearly delineated 'Negro school' (having an all-Negro faculty and staff) and a 'white school' (with all-white faculty and staff). School authorities who have heretofore operated dual school systems for Negroes and whites must assume the duty of eliminating the effects of dualism before a

> freedom of choice plan can be superimposed upon the pre-existing situation and approved as a final plan of desegregation. It is not enough to open the previously all-white schools to Negro students who desire to go there while all-Negro schools continue to be maintained as such. : . . The duty rests with the School Board to overcome the discrimination of the past, and the long-established image of the 'Negro school' can be overcome under freedom of choice only by the presence of an integrated faculty."

See also *Dowell v. School Board of Oklahoma City Public Schools*, W.D. Okla. 1965, 244 F.Supp. 971, 977, and *Franklin v. County School Board of Giles County*, 4 Cir. 1966, 360 F.2d 325.

We cannot impute to Congress an intention to repudiate Senator Humphrey's explanation of Section 604 and to change the substance of Title VI, tearing the vitals from the statutory objective. Integration of faculty is indispensable to the success of desegregation plan. Nor can we impute to Congress the intention to license, unconstitutionally, discrimination in the employment and assignment of teachers, a conspicuous badge of de jure segregated schools.[104]

[104] Chambers v. Hendersonville City Board of Education, 4 Cir. 1966, 364 F.2d 189, 192, involved the problem of surplus Negro teachers who lost their jobs when an all Negro school was abolished. The School Board treated them as new applicants. The court held that this was discriminatory. Speaking for the majority, Judge Bell said: "First, the mandate of Brown v. Board of Education, 347 U.S. 483 (1954), forbids the consideration of race in faculty selection just as it forbids it in pupil placement. See Wheeler v. Durham City Board of Education, 346 F.2d 768, 773 (4 Cir. 1965). Thus the reduction in the number of

E. As we construe the Act and its legislative history, especially the sponsors' reliance on *Bell*, Congress, because of its hands-off attitude on bona fide neighborhood school systems, qualified its broad policy of nondiscrimination by precluding HEW's requiring the bussing of children across district lines or requiring compulsory placement of children in schools to strike a balance when the imbalance results from de facto, that is, non-racially motivated segregation. As Congressman Cramer said, "De facto segregation is racial imbalance". But *there is nothing in the language of the Act or in the legislative history that equates corrective acts to desegregate or to integrate a dual school system initially based on de jure segregation with acts to bring about a racial balance in a system based on bona fide neighborhood schools.*

Congress recognized that HEW's requirements for qualifying for financial assistance are one thing and the courts' constitutional and judicial responsibilities are something else again. The Act states, therefore, that it did not enlarge the courts' existing powers to ensure compliance with constitutional standards. *But neither did it reduce the courts' power.*

V.

The HEW Guidelines agree with decisions of this circuit and of the similarly situated Fourth and

Negro pupils did not justify a corresponding reduction in the number of Negro teachers. Franklin v. County Board of Giles County, 360 F.2d 325 (4 Cir. 1966). Second, the Negro school teachers were public employees who could not be discriminated against on account of their race with respect to their retention in the system. Johnson v. Branch, 364 F.2d 177, (4 Cir. 1966) . . ."

Eighth Circuits. And *they stay within the Congressional mandate.* There is no cross-district or cross-town bussing requirement. There is no provision requiring school authorities to place white children in Negro schools or Negro children in white schools for the purpose of striking a racial balance in a school or school district proportionate to the racial population of the community or school district.[105] The provision referring to percentages is a general rule of thumb or objective administrative guide for measuring progress in desegregation rather than a firm requirement that must be met.[106] See footnotes 105 and 106.

[105] The present Commissioner of Education, Harold Howe II, in a congressional hearing declared:

> "The guidelines do not mention and do not require 'racial balance' or the correction of racial 'imbalance.' Nor have we in the administration of our obligations under Title VI sought to establish 'racial balance.' They deal only with desegregation plans designed to eliminate the dual school systems for whites and Negroes, systems being operated in violation of the 1954 Supreme Court ruling. . . . Racial imbalance certainly means the notion of trying to establish some proportion of youngsters that must be in each and every school. We are not about such an enterprise. We are trying to give the effect of free choices to enter into, or to allow free choices in having pupils enter into whatever school they may wish to attend. I do not believe that free choice plans were ever intended by the courts or by us to be an arrangement whereby the dual school system could continue without support of law. But rather an arrangement by which over a period of time we would gradually have one school system rather than two separate school systems. I do not see that we are engaged in any way in establishing procedures for balance." Hearings before the Committee on Rules, House of Representatives, 89th Cong. 2nd Sess., on H. Res. 26, Sept. 29-30, 1966, p. 32-34.

See also footnote 106.

[106] In a letter addressed to Members of Congress and Governors, dated April 9, 1966, and given wide publicity in the press, John W. Gardner, Secretary of Health, Education and Welfare explained the purpose of the percentages:

> "The second area of concern involves the percentages mentioned in the guidelines. Some have contended that this portion of the guidelines imposes a formula of 'racial balance.'

Good faith in compliance should be measured by performance, not promises.

In reviewing the effectiveness of an approved plan it seems reasonable to use some sort of yardstick or objective percentage guide. The percentage requirements in the Guidelines are modest, suggesting only that systems using free choice plans for at least two years should expect 15 to 18 per cent of the pupil population to have selected desegregated schools. This Court has frequently relied on percentages in jury ex-

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This contention misconceives the purpose of the percentages. The prevailing method of desegregation is what is called the 'free choice' plan. Under such a plan, students select their schools instead of being assigned to them on a geographic basis. Courts have expressly conditioned their approval of such plans on affirmative action by school boards to insure that 'free choice' actually exists. It is our responsibility to review such plans to insure that the choice is, in fact, free and to indicate to school districts what procedures should be used to assure true freedom of choice.

In seeking appropriate criteria to guide us in review of free choice plans, we have adopted the objective criteria applied by the courts in similar situations. One such criterion is the distribution of students by race in the various schools of a system after the students have made their choices. If substantial numbers of Negro children choose and go to previously all-white schools, the choice system is clearly operating freely. If few or none choose to do so in a community where there has been a pattern of segregation, then it is appropriate that the free choice plan be reviewed and other factors considered to determine whether the system is operating freely.

With more than 2000 separate districts to consider, such percentages are thus an administrative guide which helps us to determine those districts requiring further review. Such review in turn will determine whether or not the freedom of choice plan is in fact working fairly." New York Times, April 12, 1966, page 1.

Printed in Hearings before the Committee on Rules, House of Representatives, 89 Cong. 2nd Sess., on H. Res. 826, Sept. 29-30, 1966, p. 31. Commissioner Howe reaffirmed Secretary Gardner's policies as stated in the letter. See Hearings on H. Res. 326, p. 30-33.

clusion cases. Where the percentage of Negroes on the jury and jury venires is disproportionately low compared with the Negro population of a county, a prima facie case is made for deliberate discrimination against Negroes.[107] Percentages have been used in other civil rights cases.[108] A similar inference may be drawn in school desegregation cases, when the number of Negroes attending school with white children is manifestly out of line with the ratio of Negro school children to white school children in public schools. Common sense suggests that a gross discrepancy between the ratio of Negroes to white children in a school and the HEW percentage guides raises an inference that the school plan is not working as it should in providing a unitary, integrated system. Thus *Evans v. Buchanan*, D.C. Del. 1962, 207 F. Supp. 820[109] held that this natural inference coupled with the board's possessing the probative facts that might rebut the inference created a presumption that the proposed desegregation plan was unconstitutional.

[107] "Very decided variations in proportions of Negroes and whites on jury lists from racial proportions in the population, which variations are not explained and are long continued, furnish evidence of systematic exclusion of Negroes from jury service." United States ex rel. Seals v. Wiman, 5 Cir. 1962, 304 F.2d 53, 67.

[108] In United States v. Ward, supra at 803, the Court compared the number of Negroes registered with the number of Negroes eligible to vote. A similar practice is used in proving systematic exclusion of Negroes from juries. Cassell v. Texas, 1950, 339 U.S. 282; Avery v. Georgia, 1953, 345 U.S. 559; Smith v. Texas, 1940, 311 U.S. 128. In each instance, percentage tests have been used not as an effort to effect racial balance, but as a means of determining whether a challenged procedure is operating in a way that violates constitutional rights. See Finkelstein, The Application of Statistical Decision Theory to the Jury Discrimination Cases, 80 Harv. L. Rev. 338 (1966).

[109] See footnote 58.

The Guidelines were adopted for the entire country. However, they have been formulated in a context sympathetic with local problems. Sections 403-405 of the 1964 Civil Rights Act provide that, upon request, the Commissioner of Education may render technical assistance to public school systems engaged in desegregation. The Commissioner may also establish training institutes to counsel school personnel having educational problems occasioned by desegregation; and the Commissioner may make grants to school boards to defray the costs of providing in-service training on desegregation. In short, the Commissioner may assist those school boards who allege that they will have difficulty complying with the guidelines. When desegregation plans do not meet minimum standards, the school authorities should ask HEW for assistance. And district courts should invite HEW to assist by giving advice on raising the levels of the plans and by helping to coordinate a school's promises with the school's performance. In view of the competent assistance HEW may furnish schools, there is a heavy burden on proponents of the argument that their schools cannot meet HEW standards.

VI.

School authorities in this circuit, with few exceptions, have turned to the "freedom of choice" method for desegregating public schools. The method has serious shortcomings. Indeed, the "slow pace of integration in the Southern and border States is in large measure attributable to the manner in which

free choice plans . . . have operated."[110] When such plans leave school officials with a broad area of uncontrolled discretion, this method of desegregation is better suited than any other to preserve the essentials of the dual school system while giving paper compliance with the duty to desegregate.

A free choice plan does not abandon geographical criteria, but requires no rigid adherence to attendance zones. Theoretically every child may choose his school, but its effectiveness depends on the availability of open places in balanced schools. Moreover, unless there is some provision to prevent white children transferring out of an imbalanced school this plan will promote resegregation.[111]

[110] Rep. U. S. Comm. on Civil Rights, Survey of School Desegregation in the Southern and Border States—1965-66, p. 51. "Freedom of choice plans accepted by the Office of Education have not disestablished the dual and racially segregated school systems involved, for the following reasons: a. Negro and white schools have tended to retain their racial identity; b. White students rarely elect to attend Negro schools; c. Some Negro students are reluctant to sever normal school ties, made stronger by the racial identification of their schools; d. Many Negro children and parents in Southern States, having lived for decades in positions of subservience, are reluctant to assert their rights; e. Negro children and parents in Southern States frequently will not choose a formerly all-white school because they fear retaliation and hostility from the white community; f. In some school districts in the South, school officials have failed to prevent or punish harassment by white children of Negro children who have elected to attend white schools; g. In some areas in the South where Negroes have elected to attend formerly all-white schools, the Negro community has been subjected to retaliatory violence, evictions, loss of jobs, and other forms of intimidation." Ibid.

[111] See Goss v. Board of Education, 1963, 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632; Dillard v. School Board of the City of Charlottesville, 4 Cir. 1962, 308 F.2d 920, cert. den'd 374 U.S. 827 (1963); Jackson v. School Board of the City of Lynchburg, 4 Cir. 1963, 321 F.2d 230. For discussion of limitations to a free choice plan, see Fiss, Racial Imbalance in the Public Schools, 78 Harv. L. Rev. 563, 572 (1965).

"Under freedom of choice plans, schools tend to retain their racial identification."[112] Such plans require affirmative action by parents and pupils to disestablish the existing system of public schools. In this circuit white students rarely choose to attend schools identified as Negro schools. Negro students who choose white schools are, as we know from many cases, only Negroes of exceptional initiative and fortitude. New construction and improvements to the Negro school plant attract no white students and diminish Negro motivation to ask for transfer. Nevertheless, the Eighth Circuit has approved freedom of choice plans "as a permissible method at this stage", although recognizing that such a plan "is still only in the experimental stage and it has not yet been demonstrated that such a method will fully implement the decision of *Brown* and subsequent cases and the legislative declaration of §2000(d) of the Civil Rights Act of 1964."[113] We have said: "At this stage in the history of desegregation in the deep South a 'freedom of choice plan' is an acceptable method for a school board to use in fulfilling its duty to integrate the school system. In the long run, it is hardly possible that schools will be administered on any such haphazard basis". *Singleton II*, 355 F.2d at 71. HEW

[112] Rep. U. S. Comm. on Civ. Rights, Survey of Desegregation in the Southern and Border States, 1965-66, p. 33. The Commission also notes that racial identification of schools as Negro schools is strengthened by: (1) normal school ties; (2) the interest Negro administrators and teachers have in maintaining the dual system (from May 1965 to September 1965, 668 Negro teachers became surplus because of desegregation); (3) some Negro educators are opposed to desegregation, because past economic and cultural deprivation makes Negroes ill prepared to compete with white children in schools.

[113] Kemp v. Beasley, 8 Cir. 1965, 352 F.2d 14, 21.

recognizes freedom of choice as a permissible means of desegregation. See Revised Guidelines, Subpart B, 181.11, and all of Subpart D.

Courts should closely scrutinize all such plans. Freedom of choice plans "may . . . be invalid because the 'freedom of choice' is illusory. The plan must be tested not only by its provisions, but by the manner in which it operates to provide opportunities for a desegregated education." *Wright v. County School Board of Greenville County*, E.D.Va. 1966, 252 F.Supp. 378, 383. In that case the court was concerned that "operation under the plan may show that the transportation policy or the capacity of the schools severely limits freedom of choice, although provisions concerning these phases are valid on their face". In *Lockett v. Board of Education of Muskogee County, Ga.*, 5 Cir. 1965, 342 F.2d 225, we were concerned that "proper notice" be given so that "Negro students are afforded a reasonable and conscious opportunity to apply for admission to any school which they are otherwise eligible to attend without regard to race". Also, as Judge Bell, for the Court, pointed out, "a necessary part of the plan is a provision that the dual or biracial school attendance system . . . be abolished." See also *Dowell v. School Board of Oklahoma City Public Schools*, W.D.Okla. 1965, 244 F. Supp. 971; *Bell v. School Board of City of Staunton*, W.D.Va. 1966, 249 F.Supp. 249; *Kier v. County School Board of Augusta County*, W.D. Va. 1966, 249 F.Supp. 239.

There is much that school authorities should do to meet their responsibilities:

> "[*Brown*] called for responsible public officials to reappraise their thinking and policies, and to make every effort to afford Negroes the more meaningful equality guaranteed them by the Constitution. The Brown decision, in short, was a lesson in democracy, directed to the public at large and more particularly to those responsible for the operation of the schools. It imposed a legal and moral obligation upon officials who had created or maintained segregated schools to undo the damage which they had fostered." *Taylor v. Board of Education of the City of New Rochelle*, S.D.N.Y. 1961, 191 F. Supp. 181, 187, aff'd 294 F.2d 36, cert. den'd 368 U.S. 940 (1961).

School officials should consult with Negro and white school authorities before plans are put in final form. They should see that notices of plans and procedures are clear and timely. They should avoid the discriminatory use of tests and the use of birth and health certificates to make transfers difficult. They should eliminate inconvenient or burdensome arrangements for transfer, such as requiring the personal appearance of parents, notarized forms, signatures of both parents, or making forms available at inconvenient times to working people. They should employ forms which do not designate the name of a Negro school as the choice or contain a "waiver" of the "right" to attend white schools. Certainly school officials should not discourage Negro children from en-

rolling in white schools, directly or indirectly, as for example, by advising them that they would not be permitted to engage or would not want to engage in school activities, athletics, the band, clubs, school plays. If transportation is provided for white children, the schedules should be re-routed to provide for Negro children. Overcrowding should not be used as an excuse to avoid transfers of Negro children. In *Bradley v. School Board of the City of Richmond*, 4 Cir. 1965, 345 F.2d 310, 323, Judges Sobeloff and Bell, concurring, said:

> "A plan of desegregation is more than a matter of words. The attitude and purpose of public officials, school administrators and faculties are an integral part of any plan and determine its effectiveness more than the words employed. If these public agents translate their duty into affirmative and sympathetic action the plan will work; if their spirit is obstructive, or at best negative, little progress will be made, no matter what form of words may be used."

Freedom of choice means the maximum amount of freedom and clearly understood choice in a bona fide unitary system where schools are not white schools or Negro schools—just schools.

We turn now to a discussion of the specific elements of a freedom of choice plan that make it more than a mere word of promise to the ear.

A. *Speed of Desegregation.* The announced speed of desegregation no longer seems to be a critical issue. The school boards generally concede that by the school year 1967-68 *all* grades should be desegregated.

B. *Mandatory Annual Free Choice.* Underlying and tending to counteract the effectiveness of all the freedom of choice plans before the Court is the initial unconstitutional assignment of all students by race. When the freedom of choice plan is "permissive" or "voluntary" the effect is to superimpose the same old transfer plan on racial assignments and dual zones. We hold that any freedom of choice plan is inadequate if based upon a preliminary system of assignment by race or dual geographic zones. See *Singleton II* and *Lockett v. Board of Education of Muscogee County, Ga.*, 5 Cir. 1965, 342 F.2d 225, restating the requirement of *Stell v. Savannah-Chatham County Board of Education*, 5 Cir. 1964, 333 F.2d 55 and *Gaines v. Dougherty County Board of Education*, 5 Cir. 1964, 334 F.2d 983. It is essential that dual or biracial school attendance systems be abolished contemporaneously with the application of a plan to the respective grades reached by it.

In place of permissive freedom of choice there must be a mandatory annual free choice of schools by all students, both white and Negro. "If a child or his parent is to be given a meaningful choice, this choice must be afforded annually." *Kemp v. Beasley*, 8 Cir. 1965, 352 F.2d 14, 22. The initial choice of assignment, within space limitations, should be made by a parent or by a child over fifteen without regard to race. This

mandatory free choice system would govern even the initial assignment of students to the first grade and to kindergarten. At the minimum, a freedom of choice plan should provide that: (1) *all* students in desegregated grades shall have an opportunity to exercise a choice of schools. *Bradley v. School Board of the City of Richmond*, 4 Cir. 1965, 345 F.2d 310, vacated and remanded, 1965, 382 U.S. 103; (2) where the number of applicants applying to a school exceeds available space, preferences will be determined by a uniform non-racial standard, *Stell v. Savannah-Chatham County Board of Education*, 5 Cir. 1964, 333 F.2d 55, 65; and (3) when a student fails to exercise his choice, he will be assigned to a school under a uniform non-racial standard, *Kemp v. Beasley*, 8 Cir. 1965, 352 F.2d 14, 22.

C. *Notice.* The notice provisions of the HEW Guidelines are reasonable and should be followed. Where public notice by publication in a newspaper will assure adequate notice, individual notice will not be necessary. Individual notice should be required if notice by publication is likely to be inadequate.

D. *Transfers for Students in Non-desegregated Grades and with Special Needs.* In *Singleton II* we held that children in still-segregated grades in Negro schools "have an absolute right, as individuals, to transfer to schools from which they were excluded because of their race."[114] 355 F.2d at 869. See also

[114] This was not new. In 1957 a district court in Maryland held that stair step plans do not justify excluding a qualified individual, notwithstanding a more gradual schedule applicable to the

Rogers v. Paul, 1965, 382 U. S. 198, 15 L.Ed.2d 265. A transfer provision should be included in the plan. The right to transfer under a state Pupil Placement Law should be regarded as an additional right that takes into consideration criteria irrelevant to the absolute right referred to in *Rogers v. Paul*.

E. *Services, Facilities, Activities, and Programs.* In *Singleton II* we held that there should be no segregation or discrimination in services, facilities, activities, and programs that may be conducted or sponsored by, or affiliated with, the school in which a student is enrolled. We have in mind school athletics and inter-scholastic associations of course, but also parents-teachers associations. In order to eliminate any uncertainty on this point, we hold that the plan should contain a statement that there will be no such segregation or discrimination.

F. *School Equalization.* In recent years, as we are all well aware, Southern states have exerted great effort to improve Negro school plants. There are however many old and inferior schools readily identifiable as Negro schools; there are also many superior white schools, in terms of the quality of instruction. A freedom of choice plan will be ineffective if the students cannot choose among schools that are substantially equal. A school plan therefore should provide for

school population generally. Moore v. Board of Education of Harford County, D.Md. 1957, 146 F. Supp. 91 and 152 F.Supp. 114, aff'd sub.nom. Slade v. Board of Education, 4 Cir. 1958, 252 F.2d 191, cert. den'd 357 U.S. 906 (1958). This Court approved such an order in Augustus v. Board of Education, 5 Cir. 1962, 306 F.2d 863.

closing inferior schools and should also include a provision for remedial programs to overcome past inadequacies of all-Negro schools. This will, of course, require the local school authorities and the trial courts to examine carefully local situations and perhaps seek advice from qualified, unbiased authorities in the field.

G. *Scheduled Compliance Reports.* Scheduled compliance reports to the court on the progress of freedom of choice plans are a necessity and of benefit to all the parties. These should be required following the choice period and again after the opening of school. None of the school boards expressly objected to this provision, or one similar to it, and it does not appear onerous.

H. *Desegregation of Faculty and Staff.* The most difficult problem in the desegregation process is the integration of faculties. See Section IV D of this opinion. A recent survey shows that until the 1966-67 session not a single Negro teacher in Alabama, Louisiana, or Mississippi has been assigned to a school where there are white teachers.[115] As evidenced in numerous records, this long continued policy has resulted in inferior Negro teaching and in inferior education of Negroes as a class. Everyone agrees, on principle, that the selection and assignment of teachers on merit should not be sacrificed just for the sake of integrating faculties; teaching is an art. Yet until

[115] See footnote 35. However, the press has carried accounts that progress is being made toward "desegregation of teachers, administrators and other personnel" for 1967-68 in Jackson, Mississippi. See Jackson Clarion Ledger, July 30, 1966, page 1.

school authorities recognize and carry out their affirmative duty to integrate faculties as well as facilities, there is not the slightest possibility of their ever establishing an operative non-discriminatory school system.[116] The transfer of a few Negro children to a white school does not do away with the dual system. A Negro faculty makes a Negro school; the Negro school continues to offer inferior educational opportunities; and the school system continues its psychological harm to Negroes as a class by not putting them on an equal level with white children as a class.[117] To prevent such harm or to undo the harm, or to prevent resegregation, the school authorities, even in the administration of an otherwise rational, nondiscriminatory policy, should take corrective action involving racial criteria. As we pointed out (see Section III C), in fashioning an appropriate remedy tending to undo past discrimination this Court has often taken race into account.

In the past year, district courts have struggled with the problem of framing effective orders for the desegregation of faculty. (1) Some courts have focused upon the specific results to be reached by reassign-

[116] "Faculty desegregation is a necessary precondition of an acceptable free choice plan. A free choice plan cannot disestablish the dual school system where faculties remain segregated on the basis of the race of the teachers or the pupils. In such circumstances a school inevitably will remain identified as "white" and "Negro" depending on the color of the teachers." Rep., U.S. Comm. on Civil Rights, Survey of Desegregation in the Southern and Border States—1965-66, p. 57.

[117] Faculties should be desegregated so that "both white and Negro students would feel that their color was represented upon an equal level and that their people were sharing the responsibility of high-level teaching". Dowell v. School Board of Oklahoma City Public Schools, W.D. Okla. 1965, 219 F. Supp. 427.

ment of teachers previously assigned solely upon the basis of their race. *Dowell v. School Board of Oklahoma City Public Schools*, W.D.Okla. 1965, 244 F. Supp. 971, *Kier v. County School Board of Augusta County*, W.D.Va. 1966, 249 F. Supp. 239.[118] The orders entered in these cases require the defendant school boards to assign any newly employed teachers and reassign already-employed faculty so that the proportion of each race assigned to teach in each school will be the same as the proportion of teachers of that race in the total teaching staff in the system, or at least, of the particular school level in which they are employed. (2) Other courts have not been specific as to the number of teachers of each race that should be assigned to each school in order to remove the effects of past discriminatory assignments. These courts have focused upon the mechanics to be followed in removing the effect of past discrimination rather than upon the result as such. Thus, in *Beckett v. School Board of the City of Norfolk*, Civil Action No. 2214 (E.D.Va., 1966); *Gilliam v. School Board of the City of Hopewell*, Civil Action No. 3554 (E.D.Va. 1966); and *Bradley v. School Board of the City of Richmond*, Civil Action No. 3353 (E.D.Va. 1966), the courts approved consent decrees setting forth in detail the considerations that would control the school administrators in filling faculty vacancies and in transferring already-

[118] In *Kier* the Court said that duty to desegregrate faculty must be "immediately and squarely met"; there can be no freedom of choice for faculties and administrative staffs by the 1966-67 school year. Insofar as possible, "the percentage of Negro teachers in each school of the system should approximate the percentage of Negro teachers in the entire system for the 1965-66 season". 249 F. Supp. at 22.

employed faculty members in order to facilitate faculty integration. (3) In a third group of cases, the district court, while emphasizing the necessity of affirmative steps to undo the effects of past racial assignments of faculty and while requiring some tangible results, has not been specific regarding the mechanics or the specific results to be achieved. See *Harris v. Bullock County Board of Education*, M.D Ala. 1966, 253 F. Supp. 276; *United States v. Lowndes Board of Education*, Civil Action No. 2328-N (M.D.Ala. 1966); *Carr v. Montgomery County Board of Education*, M.D.Ala. 1966, 253 F. Supp. 306.

We agree with the Eighth Circuit's statement: "The lack of a definite program will only result in further delay of long overdue action. We are not content at this late date to approve a desegregation plan that contains only a statement of general good intention. We deem a positive commitment to a reasonable program aimed at ending segregation of the teaching staff to be necessary for the final approval of a constitutionally adequate desegregation plan." *Clark v. Board of Education of the Little Rock School District*, No. 18,368, December 15, 1966 (unreported). In that case the Court did not impose "a set time with fixed mathematical requirements". However the Court was firm in its position: "First, as the Board has already positively pledged, future employment, assignment, transfer, and discharge of teachers must be free from racial consideration. Two, should the desegregation process cause the closing of schools employing individuals predominately of one race, the

displaced personnel should, at the very minimum, be absorbed into vacancies appearing in the system. *Smith v. Board of Education of Morrilton, supra.* Third, whenever possible, requests of individual staff members to transfer into minority situations should be honored by the Board. Finally, we believe the Board should make all additional positive commitments necessary to bring about some measure of racial balance in the staffs of the individual schools in the very near future. The age old distinction of 'white schools' and 'Negro schools' must be erased. The continuation of such distinctions only perpetrates inequality of educational opportunity and places in jeopardy the effective future operation of the entire 'freedom of choice' type plan."

In *Singleton I* we agreed with the original HEW Guidelines in requiring that an "adequate start" toward faculty desegregation should be made in 1966-67. The requirement that all grades be desegregated in 1967-68 increases the need for substantial progress beyond an "adequate start". It is essential that school officials (1) cease practicing racial discrimination in the hiring and assignment of *new* faculty members and (2) take affirmative programmatic steps to correct existing effects of past racial assignment. If these two requirements are prescribed, the district court should be able to add specifics to meet the particular situation the case presents. The goal should be an equitable distribution of the better teachers.[119]

[119] Rev. Theodore M. Hesburgh, President of Notre Dame and a member of the Civil Rights Commission, makes these suggestions: "A realistic and quite possible approach to this is, I think, through the immediate improvement of all teachers of each race,

We anticipate that when district courts and this Court have gained more experience with faculty integration, the Court will be able to set forth standards more specifically than they are set forth in the decrees in the instant cases.

VII.

We attach a decree to be entered by the district courts in these cases consolidated on appeal. See Appendix A.

We have carefully examined each of the records in these cases. In each instance the record supports the decree. However, the provisions of the decree are intended, as far as possible, to apply uniformly throughout this circuit in cases involving plans based on free choice of schools. School boards, private plaintiffs, and the United States may, of course, come into court to prove that exceptional circum-

beginning with those who most need assistanee in being better qualified as teachers. ¶ At this precise time of transition, why not institute along with the whole process of desegregation in the South a positive program of upgrading all teachers in the present systems? In fact, the best teachers of either race, worthy of their profession, should be put in the schools needing the most help to improve. One might even think of rotating teachers within the schools of a given district. There is already the existing pattern of academic year and summer institutes for just this purpose of improving teachers. . . . ¶ If this positive action could be moved along quickly, with good will from all concerned, school administrators, parents, and students, then we could eliminate the present cat-and-mouse game which is going on between the Federal Office of Education and the local Southern school districts. In fact, I have a feeling that the South could solve its problem long before the North, which has an educational desegregation problem which may be less amenable to solution because of entrenched patterns of housing segregation." Rep., U. S. Comm. on Civil Rights, Survey of Desegregation in the Southern and Border States—1965-66, p. 64.

stances compel modification of the decree. For example, school systems in areas which let school out during planting and harvesting seasons may find that the period for exercise of choice of schools, March 1-31, should be changed to a different month.

As *Brown* dictates, the decree places responsibility on the school authorities to take affirmative action to bring about a unitary, non-racial system. As the Constitution dictates, the proof of the pudding is in the eating: the proof of a school board's compliance with constitutional standards is the result—the performance. Has the operation of the promised plan actually eliminated segregated and token-desegregated schools and achieved substantial integration?

The substantive requirements of the decree derive from the Fourteenth Amendment as interpreted by decisions of the Supreme Court and of this Court, in many instances before the HEW Guidelines were published. For administrative details, we have looked to the Office of Education. For example, those familiar with the HEW Guidelines will note that the decree follows the Guidelines exactly as to the form letters which go to parents announcing the need to exercise a choice of schools, and the forms for exercising that choice are the same. Indeed a close parallel will be noted between much in Parts II through V of the decree and the Guideline provisions.

The great bulk of the school districts in this circuit have applied for federal financial assistance and

therefore operate under voluntary desegregation plans.[120] Approval of these plans by the Office of Education qualifies the schools for federal aid. In this opinion we have held that the HEW Guidelines now in effect are constitutional and are within the statutory authority created in the Civil Rights Act of 1964. Schools therefore, in compliance with the Guidelines can in general be regarded as discharging constitutional obligations.

Some schools have made no move to desegregate or have had plans rejected as unsatisfactory by district courts or the HEW. We expect the provisions of the decree to be applied in proceedings involving such schools. Other schools have earlier court-approved plans which fall short of the terms of the decree. On motion by proper parties to re-open these cases, we expect these plans to be modified to conform with our decree. In some cases the parties may challenge various aspects of HEW-approved plans. Our approval of the existing Guidelines and the deference owed to any future Guidelines is not intended to deny a day in court to any person asserting individual rights or

[120] "Although only 164 (3.4 percent) of the 4,941 school districts in the South have qualified by the court order route, these districts include most of the major cities of the South and, accordingly, a large share of the population. Court orders are a significant method of qualification particularly in Louisiana, where official resistance to compliance with Title VI has been most widespread. In Louisiana, 32 court orders have been accepted, affecting 86.5 percent of the school districts judged qualified." 1966—U. S. Comm. on Civ. Rights, Survey of School Desegregation in the Southern and Border States 46. See also Table 3 in Appendix B.

to any school board contesting HEW action.[121] In any school desegregation case the issue concerns the constitutional rights of Negroes, individually and as a class, and the constitutional rights of the State—not the issue whether federal financial assistance should be withheld under Title VI of the Civil Rights Act of 1964.

When school systems are under court-ordered desegregation, the courts are responsible for determining the sufficiency of the system's compliance with the decree. The courts' task, therefore, is a continuing process, especially in major areas readily susceptible of observation and measurement, such as faculty integration and student desegregation. (1) As to faculty, we have found that school authorities have an affirmative duty to break up the historical pattern of segregated faculties, the hall-mark of the dual system. To aid the courts in its task, the decree requires the school authorities to report to the district courts the progress made toward faculty integration. The school authorities bear the burden of justifying an apparent lack of progress.[122] (2) As to students, the

[121] For an HEW approved desegregation plan held insufficient to protect constitutional rights of Negro students see Brown v. Board of Education of DeWitt School District, E.D. Ark. 1966, F.Supp. See also Thompson v. County School Board of Hanover County, E.D.Va. 1966, 252 F. Supp. 546; Turner v. County School Board of Goochland County, E.D.Va. 1966, 252 F. Supp. 578.

[122] "Innumerable cases have clearly established the principle that under circumstances such as this where a history of racial discrimination exists, the burden of proof has been thrown upon the party having the power to produce the facts. . . ." Chambers v. Hendersonville City Board of Education, 4 Cir. 1966, 364 F.2d 189, 192. In *Brown II*, permitting desegregation with *"deliberate* speed" the Supreme Court put the "burden . . . upon the defendants to establish that [additional] time is necessary to carry out the ruling in an effective manner". 349 U.S. at 302.

decree requires school authorities to make reports to the court showing by race, by school, by grade, the choices made in each "choice period". A similar report is required after schools open to show what actually happened when schools opened.

What the decree contemplates, then, is continuing judicial evaluation of compliance by measuring the performance—not merely the promised performance—of school boards in carrying out their constitutional obligation "to disestablish dual, racially segregated school systems and to achieve substantial integration within such systems."[123] District courts may call upon HEW for assistance in determining whether a school board's performance measures up to its obligation to desegregate. If school officials in any district should find that their district still has segregated faculties and schools or only token integration, their affirmative duty to take corrective action requires them to try an alternative to a freedom of choice plan, such as a geographic attendance plan, a combination of the two, the Princeton plan,[124] or some other acceptable substitute, perhaps aided by an educational park. Freedom of choice is not a key that opens all doors to equal educational opportunities.

Given the knowledge of the educators and administrators in the Office of Education and their day to

[123] U. S. Comm. on Civil Rights, Survey of School Desegregation in the Southern and Border States 1965-66, p. 54.

[124] The Princeton plan involves establishing attendance zones including more than one school and assigning students by grade rather than by residence location. Thus all of the zone's students in grades 1 through 3 would attend school A, while all students in grades 4 through 6 would attend school B. For a discussion of the plan see Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 Harv. L. Rev. 564, 573 (1965).

day experience with thousands of school systems, judges and school officials can ill afford to turn their backs on the proffer of advice from HEW. Or from any responsible government agency or independent group competent to work toward solution of the complex problem of de jure discrimination bequeathed this generation by ten preceding generations.

Now after twelve years of snail's pace progress toward school desegregation, courts are entering a new era. The question to be resolved in each case is: How far have formerly de jure segregated schools progressed in performing their affirmative constitutional duty to furnish equal educational opportunities to all public school children? The clock has ticked the last tick for tokenism and delay in the name of "deliberate speed".

* * * * *

In the suit against the Caddo Parish School Board July 19, 1965, the United States moved to intervene under §902 of the Civil Rights Act of 1964 (42 U.S.C. §2000h-2). The motion was filed twelve days after the Board submitted its plan in compliance with the district court's decree of June 14, 1965, but two days before the original plaintiffs filed their objections and before the court issued its order approving the plan. The district court denied the motion on the ground that it came too late. In these circumstances we consider that the motion was timely filed and should have been granted.

This Court denied the motion of certain appellants to consolidate their cases, but allowed consolidation of briefs and, in effect, treated the cases as consolidated for purposes of appeal. The Court, however, in each case has separately considered the particular contentions of all the parties in the light of the record.

The Court REVERSES the judgments below and REMANDS each case to the district court for further proceedings in accordance with this opinion.

COX, District Judge: I reserve the right to dissent in whole or in part at a later date.

APPENDIX A:

PROPOSED DECREE

It is ORDERED, ADJUDGED and DECREED that the defendants, their agents, officers, employees and successors and all those in active concert and participation with them, be and they are permanently enjoined from discriminating on the basis of race or color in the operation of the school system. As set out more particularly in the body of the decree, they shall take affirmative action to disestablish all school segregation and to eliminate the effects of past racial discrimination in the operation of the school system:

I.

SPEED OF DESEGREGATION

Commencing with the 1967-68 school year, in accordance with this decree, all grades, including kindergarten grades, shall be desegregated and pupils assigned to schools in these grades without regard to race or color.

II.

EXERCISE OF CHOICE

The following provisions shall apply to all grades:

(a) *Who May Exercise Choice.* A choice of schools may be exercised by a parent or other adult person

serving as the student's parent. A student may exercise his own choice if he (1) is exercising a choice for the ninth or a higher grade, or (2) has reached the age of fifteen at the time of the exercise of choice. Such a choice by a student is controlling unless a different choice is exercised for him by his parent or other adult person serving as his parent during the choice period or at such later time as the student exercises a choice. Each reference in this decree to a student's exercising a choice means the exercise of the choice, as appropriate, by a parent or such other adult, or by the student himself.

(b) *Annual Exercise of Choice.* All students, both white and Negro, shall be required to exercise a free choice of schools annually.

(c) *Choice Period.* The period for exercising choice shall commence May 1, 1967 and end June 1, 1967, and in subsequent years shall commence March 1 and end March 31 preceding the school year for which the choice is to be exercised. No student or prospective student who exercises his choice within the choice period shall be given any preference because of the time within the period when such choice was exercised.

(d) *Mandatory Exercise of Choice.* A failure to exercise a choice within the choice period shall not preclude any student from exercising a choice at any time before he commences school for the year with respect to which the choice applies, but such choice may be subordinated to the choices of students who

exercised choice before the expiration of the choice period. Any student who has not exercised his choice of school within a week after school opens shall be assigned to the school nearest his home where space is available under standards for determining available space which shall be applied uniformly throughout the system.

(e) *Public Notice.* On or within a week before the date the choice period opens, the defendants shall arrange for the conspicuous publication of a notice describing the provisions of this decree in the newspaper most generally circulated in the community. The text of the notice shall be substantially similar to the text of the explanatory letter sent home to parents. (See paragraph II(e).) Publication as a legal notice will not be sufficient. Copies of this notice must also be given at that time to all radio and television stations serving the community. Copies of this decree shall be posted in each school in the school system and at the office of the Superintendent of Education.

(e) *Mailing of Explanatory Letters and Choice Forms.* On the first day of the choice period there shall be distributed by first-class mail an explanatory letter and a choice form to the parent (or other adult person acting as parent, if known to the defendants) of each student, together with a return envelope addressed to the Superintendent. Should the defendants satisfactorily demonstrate to the court that they are unable to comply with the requirement

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of distributing the explanatory letter and choice form by first-class mail, they shall propose an alternative method which will maximize individual notice, i.e., personal notice to parents by delivery to the pupil with adequate procedures to insure the delivery of the notice. The text for the explanatory letter and choice form shall essentially conform to the sample letter and choice form appended to this decree.

(g) *Extra Copies of the Explanatory Letter and Choice Form.* Extra copies of the explanatory letter and choice form shall be freely available to parents, students, prospective students, and the general public at each school in the system and at the office of the Superintendent of Education during the times of the year when such schools are usually open.

(h) *Content of Choice Form.* Each choice form shall set forth the name and location of the grades offered at each school and may require of the person exercising the choice the name, address, age of student, school and grade currently or most recently attended by the student, the school chosen, the signature of *one* parent or other adult person serving as parent, or where appropriate the signature of the student, and the identity of the person signing. No statement of reasons for a particular choice, or any other information, or any witness or other authentication, may be required or requested, without approval of the court.

(i) *Return of Choice Form.* At the option of the person completing the choice form, the choice may

be returned by mail, in person, or by messenger to any school in the school system or to the office of the Superintendent.

(j) *Choices not on Official Form.* The exercise of choice may also be made by the submission in like manner of any other writing which contains information sufficient to identify the student and indicates that he has made a choice of school.

(k) *Choice Forms Binding.* When a choice form has once been submitted and the choice period has expired, the choice is binding for the entire school year and may not be changed except in cases of parents making different choices from their children under the conditions set forth in paragraph II (a) of this decree and in exceptional cases where, absent the consideration of race, a change is educationally called for or where compelling hardship is shown by the student.

(l) *Preference in Assignment.* In assigning students to schools, no preferences shall be given to any student for prior attendance at a school and, except with the approval of court in extraordinary circumstances, no choice shall be denied for any reason other than overcrowding. In case of overcrowding at any school, preference shall be given on the basis of the proximity of the school to the homes of the students choosing it, without regard to race or color. Standards for determining overcrowding shall be applied uniformly throughout the system.

(m) *Second Choice where First Choice is Denied.* Any student whose choice is denied must be promptly notified in writing and given his choice of any school in the school system serving his grade level where space is available. The student shall have seven days from the receipt of notice of a denial of first choice in which to exercise a second choice.

(n) *Transportation.* Where transportation is generally provided, buses must be routed to the maximum extent feasible in light of the geographic distribution of students, so as to serve each student choosing any school in the system. Every student choosing either the formerly white or the formerly Negro school nearest his residence must be transported to the school to which he is assigned under these provisions, whether or not it is his first choice, if that school is sufficiently distant from his home to make him eligible for transportation under generally applicable transportation rules.

(o) *Officials not to Influence Choice.* At no time shall any official, teacher, or employee of the school system influence any parent, or other adult person serving as a parent, or any student, in the exercise of a choice or favor or penalize any person because of a choice made. If the defendant school board employs professional guidance counselors, such persons shall base their guidance and counselling on the individual student's particular personal, academic, and vocational needs. Such guidance and counselling by teachers as well as professional guidance counsellors

shall be available to all students without regard to race or color.

(p) *Protection of Persons Exercising Choice.* Within their authority school officials are responsible for the protection of persons exercising rights under or otherwise affected by this decree. They shall, without delay, take appropriate action with regard to any student or staff member who interferes with the successful operation of the plan. Such interference shall include harassment, intimidation, threats, hostile words or acts, and similar behavior. The school board shall not publish, allow, or cause to be published, the names or addresses of pupils exercising rights or otherwise affected by this decree. If officials of the school system are not able to provide sufficient protection, they shall seek whatever assistance is necessary from other appropriate officials.

III.

PROSPECTIVE STUDENTS

Each prospective new student shall be required to exercise a choice of schools before or at the time of enrollment. All such students known to defendants shall be furnished a copy of the prescribed letter to parents, and choice form, by mail or in person, on the date the choice period opens or as soon thereafter as the school system learns that he plans to enroll. Where there is no pre-registration procedure for newly entering students, copies of the choice forms shall be available at the Office of the Superintendent and at each school during the time the school is usually open.

IV.

TRANSFERS

(a) *Transfers for Students.* Any student shall have the right at the beginning of a new term, to transfer to any school from which he was excluded or would otherwise be excluded on account of his race or color.

(b) *Transfers for Special Needs.* Any student who requires a course of study not offered at the school to which he has been assigned may be permitted, upon his written application, at the beginning of any school term or semester, to transfer to another school which offers courses for his special needs.

(c) *Transfers to Special Classes or Schools.* If the defendants operate and maintain special classes or schools for physically handicapped, mentally retarded, or gifted children, the defendants may assign children to such schools or classes on a basis related to the function of the special class or school that is other than freedom of choice. In no event shall such assignments be made on the basis of race or color or in a manner which tends to perpetuate a dual school system based on race or color.

V.

SERVICES, FACILITIES, ACTIVITIES AND PROGRAMS

No student shall be segregated or discriminated against on account of race or color in any service, facility, activity, or program (including transportation, athletics, or other extracurricular activity) that may be conducted or sponsored by or affiliated with the school in which he is enrolled. A student attending school for the first time on a desegregated basis may not be subject to any disqualification or waiting period for participation in activities and programs, including athletics, which might otherwise apply because he is a transfer or newly assigned student except that such transferees shall be subject to longstanding, non-racially based rules of city, county, or state athletic associations dealing with the eligibility of transfer students for athletic contests. All school use or school-sponsored use of athletic fields, meeting rooms, and all other school related services, facilities, activities, and programs such as Commencement exercises and parent-teacher meetings which are open to persons other than enrolled students, shall be open to all persons without regard to race or color. All special educational programs conducted by the defendants shall be conducted without regard to race or color.

VI.

SCHOOL EQUALIZATION

(a) *Inferior Schools.* In schools heretofore maintained for Negro students, the defendants shall take prompt steps necessary to provide physical facilities, equipment, courses of instruction, and instructional materials of quality equal to that provided in schools previously maintained for white students. Conditions of overcrowding, as determined by pupil-teacher ratios and pupil-classroom ratios shall, to the extent feasible, be distributed evenly between schools formerly maintained for Negro students and those formerly maintained for white students. If for any reason it is not feasible to improve sufficiently any school formerly maintained for Negro students, where such improvement would otherwise be required by this subparagraph, such school shall be closed as soon as possible, and students enrolled in the school shall be reassigned on the basis of freedom of choice. By October of each year, defendants shall report to the Clerk of the Court pupil-teacher ratios, pupil-classroom ratios, and per-pupil expenditures both as to operating and capital improvement costs, and shall outline the steps to be taken and the time within which they shall accomplish the equalization of such schools.

(b) *Remedial Programs.* The defendants shall provide remedial education programs which permit students attending or who have previously attended all-Negro schools to overcome past inadequacies in their education.

VII.

NEW CONSTRUCTION

The defendants, to the extent consistent with the proper operation of the school system as a whole, shall locate any new school and substantially expand any existing schools with the objective of eradicating the vestiges of the dual system and of eliminating the effects of segregation.

VIII.

FACULTY AND STAFF

(a) *Faculty Employment.* Race or color shall not be a factor in the hiring, assignment, reassignment, promotion, demotion, or dismissal of teachers and other professional staff members, including student teachers, except that race may be taken into account for the purpose of counteracting or correcting the effect of the segregated assignment of teachers in the dual system. Teachers, principals, and staff members shall be assigned to schools so that the faculty and staff is not composed exclusively of members of one race. Wherever possible, teachers shall be assigned so that more than one teacher of the minority race (white or Negro) shall be on a desegregated faculty. Defendants shall take positive and affirmative steps to accomplish the desegregation of their school faculties and to achieve substantial desegregation of faculties in as many of the schools as possible for the 1967-68 school year notwithstanding

that teacher contracts for the 1966-67 or 1967-68 school years may have already been signed and approved. The tenure of teachers in the system shall not be used as an excuse for failure to comply with this provision. The defendants shall establish as an objective that the pattern of teacher assignment to any particular school not be identifiable as tailored for a heavy concentration of either Negro or white pupils in the school.

(b) *Dismissals.* Teachers and other professional staff members may not be discriminatorily assigned, dismissed, demoted, or passed over for retention, promotion, or rehiring, on the ground of race or color. In any instance where one or more teachers or other professional staff members are to be displaced as a result of desegregation, no staff vacancy in the school system shall be filled through recruitment from outside the system unless no such displaced staff member is qualified to fill the vacancy. If, as a result of desegregation, there is to be a reduction in the total professional staff of the school system, the qualifications of all staff members in the system shall be evaluated in selecting the staff member to be released without consideration of race or color. A report containing any such proposed dismissals, and the reasons therefor, shall be filed with the Clerk of the Court, serving copies upon opposing counsel, within five (5) days after such dismissal, demotion, etc., as proposed.

(c) *Past Assignments.* The defendants shall take steps to assign and reassign teachers and other pro-

fessional staff members to eliminate past discriminatory patterns.

IX.

REPORTS TO THE COURT

(1) *Report on Choice Period.* The defendants shall serve upon the opposing parties and file with the Clerk of the Court on or before April 15, 1967, and on or before June 15, 1967, and in each subsequent year on or before June 1, a report tabulating by race the number of choice applications and transfer applications received for enrollment in each grade in each school in the system, and the number of choices and transfers granted and the number of denials in each grade of each school. The report shall also state any reasons relied upon in denying choice and shall tabulate, by school and by race of student, the number of choices and transfers denied for each such reason.

In addition, the report shall show the percentage of pupils actually transferred or assigned from segregated grades or to schools attended predominantly by pupils of a race other than the race of the applicant, for attendance during the 1966-67 school year, with comparable data for the 1965-66 school year. Such additional information shall be included in the report served upon opposing counsel and filed with the Clerk of the Court.

(2) *Report After School Opening.* The defendants shall, in addition to reports elsewhere described,

serve upon opposing counsel and file with the Clerk of the Court within 15 days after the opening of schools for the fall semester of each year, a report setting forth the following information:

(i) The name, address, grade, school of choice and school of present attendance of each student who has withdrawn or requested withdrawal of his choice of school or who has transferred after the start of the school year, together with a description of any action taken by the defendants on his request and the reasons therefor.

(ii) The number of faculty vacancies, by school, that have occurred or been filled by the defendants since the order of this Court or the latest report submitted pursuant to this subparagraph. This report shall state the race of the teacher employed to fill each such vacancy and indicate whether such teacher is newly employed or was transferred from within the system. The tabulation of the number of transfers within the system shall indicate the schools from which and to which the transfers were made. The report shall also set forth the number of faculty members of each race assigned to each school for the current year.

(iii) The number of students by race, in each grade of each school.

EXPLANATORY LETTER

(School System Name and Office Address)

(Date Sent)

Dear Parent:

All grades in our school system will be desegregated next year. Any student who will be entering one of these grades next year may choose to attend any school in our system, regardless of whether that school was formerly all-white or all-Negro. It does not matter which school your child is attending this year. You and your child may select any school you wish.

Every student, white and Negro, must make a choice of schools. If a child is entering the ninth or higher grade, or if the child is fifteen years old or older, he may make the choice himself. Otherwise a parent or other adult serving as parent must sign the choice form. A child enrolling in the school system for the first time must make a choice of schools before or at the time of his enrollment.

The form on which the choice should be made is attached to this letter. It should be completed and returned by June 1, 1967. You may mail it in the enclosed envelope, or deliver it by messenger or by hand to any school principal or to the Office of the Superintendent at any time between May 1 and June 1. No one may require you to return your choice form before June 1 and no preference is given for returning the choice form early.

No principal, teacher or other school official is permitted to influence anyone in making a choice or to require early return of the choice form. No one is permitted to favor or penalize any student or other person because of a choice made. A choice once made cannot be changed except for serious hardship.

No child will be denied his choice unless for reasons of overcrowding at the school chosen, in which case children living nearest the school will have preference.

Transportation will be provided, if reasonably possible, no matter what school is chosen. [Delete if the school system does not provide transportation.]

Your School Board and the school staff will do everything we can to see to it that the rights of all students are protected and that desegregation of our schools is carried out successfully.

Sincerely yours,

Superintendent.

CHOICE FORM

This form is provided for you to choose a school for your child to attend next year. You have 30 days to make your choice. It does not matter which school your child attended last year, and does not matter whether the school you choose was formerly a white or Negro school. This form must be mailed or brought

to the principal of any school in the system or to the office of the Superintendent, [address], by June 1, 1967. A choice is required for each child.

Name of child .....
(Last) (First) (Middle)

Address .....

Name of Parent or other
adult serving as parent .....

If child is entering first grade, date of birth:
.....
(Month) (Day) (Year)

Grade child is entering .....

School attended last year .....

Choose one of the following schools by marking an X beside the name.

Name of School	Grade	Location
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....

Signature .....
Date .....

.....
.....

To be filled in by Superintendent:
School Assigned .....[1]

1. In subsequent years the dates in both the explanatory letter and the choice form should be changed to conform to the choice period.

APPENDIX B.

Rate of Change and Status of Desegregation

(Leeson, Faster Pace, Scarcer Records, Southern Education Report 28-32 (Jan.-Feb. 1966), quoted in Emmerson and Huber, Political and Civil Rights in the United States, 695-99 (1967))

". . . Both the 11-state Southern area and the border area, the latter consisting of six states and the District of Columbia, experienced a sharper increase in the percentage of Negroes in desegregated schools for 1965-66 than in previous years. But only the Southern states showed a changed attitude toward reporting records by race; in only three Southern states could nearly complete statistics be obtained district by district. As in other years, three of the border states plus the District of Columbia continued to keep records by race, and three states did not.

Correspondents for Southern Education Reporting Service . . . found that 15.89 per cent of the Negroes enrolled in the public schools of the region attended classes with whites, mostly in formerly all-white schools but sometimes also in formerly all-Negro schools. This numbered 567,789 Negro students out of the region's Negro enrollment of 3,572,810.

In the first 10 years after the Supreme Court decisions on segregated schools, in 1954 and 1955, the

Southern and border region increased the number of Negroes in schools with whites at an average of about one per cent a year. Although the impetus of the Supreme Court's rulings and the possibility of direct involvement in legal action were factors, most districts desegregating through last year acted "voluntarily" and only about 10 per cent required a specific court order. By the end of the 1964-65 school year, the region had enrolled 10.9 per cent of its Negro students in biracial classrooms.

The 1964 Civil Rights Act brought pressure on every district in the nation but the compliance effort admittedly was concentrated on the South. . . . Beginning in the spring of 1965 and continuing even through the first months of the 1965-66 school year, HEW's Office of Education negotiated with officials in each district to obtain compliance by the school officials either signing a statement, submitting a court-ordered desegregation plan or adopting a voluntary plan.

With the new school year, the region had increased the number of Negroes in desegregated schools by five percentage points to reach 15.9 per cent, while in the previous two school years the rate of increase in this figure had only been between one and two percentage points. For 1964-65, the region had 10.9 per cent of the Negro enrollment in desegregated schools, an increase of 1.7 percentage points over 1963-64, and for that year the 9.2 per cent figure was an increase of 1.2 percentage points over 1962-63. (*See Table* I.) . . .

TABLE I

The Rate of Change

Percentage of Negroes in Schools with Whites

School Year	South	% Change	Border	% Change	Region	% Change
1959-60*	.160		45.4		6.4	
1960-61	.162	.002	49.0	3.6	7.0	.6
1961-62	.241	.079	52.5	3.5	7.6	.6
1962-63	.453	.212	51.8	0.7	8.0	.4
1963-64	1.17	.717	54.8	3.0	9.2	1.2
1964-65	2.25	1.08	58.3	3.5	10.9	1.7
1965-66	6.01	3.76	68.9	10.6	15.9	5.0

* First school year in which SERS began recording number of Negroes in schools with whites.

Up through the 1962-63 school year, the 11 Southern states together had fewer than one per cent of their Negro students in schools with whites. In 1963-64, the figure passed the one per cent mark and it almost doubled for 1964-65 to become 2.25 per cent of the Negroes in biracial schools, an increase of more than one percentage point. For the 1965-66 school year, the percentage more than doubled and reached 6.01 per cent.[1]

[1] Other estimates are summarized in Report of the United States Commission on Civil Rights, Survey of School Desegregation in the Southern and Border States 1965-1966, 27-28 (Feb. 1966)

". . . The Office of Education based on a sampling of 590 districts through a telephone survey conducted in cooperation with State departments of education, estimates that 216,000, or 7.5 percent, of the Negro students in the 11 Deep South States are enrolled in schoo this year with white pupils. [Office of Education, telephone survey, Table I, Sept. 27, 1965.] Civil rights organizations, relying upon figures obtained from a variety of sources, including field workers, advance a lower figure. The Southern Regional Council's estimate is 151,416 Negro pupils, or 5.23 percent of the total. [Southern Regional Council, 'School

The six border states and the District of Columbia desegregated at a faster rate than did the South, and by the 1961-62 school year that area had more than half of its Negro enrollment attending desegregated schools. The annual change in the number of Negroes in desegregated border schools averaged about three per cent a year, and by 1964-65, the border area had desegregated 58.3 per cent of its Negro enrollment. In the current school year, the border area has 68.9 per cent of its Negro students attending the same schools with whites, a jump of over 10 percentage points from the previous year's figure.

This year, as in previous years, a disparity exists between what might be called "technical" desegregation and "actual" desegregation. Last year, for example, 56 per cent of the region's Negro students were enrolled in districts having desegregation policies, but about 11 per cent of the total Negro enrollment attended desegregated schools. This year, the region has 97 per cent of its districts in official compliance with federal desegregation regulations, and 93 per cent of the region's combined Negro and white enrollment comes from these districts. However, the actual attendance of Negroes in desegregated schools amounts to almost 16 per cent. The difference in these figures was accentuated this year by the fact that almost 2,000 school districts having either all-

Desegregation: Old Problems Under a New Law' 9, Sept. 1965.] The American Friends Service Committee and NAACP Legal Defense and Educational Fund agree that the actual figure is less than 6 percent [American Friends Service Committee and NAACP Legal Defense and Educational Fund, 'Report on the Implementation of Title VI of the Civil Rights Act of 1964 in Regard to School Desegregation' 4, Nov. 15, 1965]."

white or all-Negro enrollments are included in the "in compliance" statistics. . . .

Among the Southern states, Texas leads in the number and percentage of Negroes in schools with whites —an estimated 60,000 Negroes or 17 per cent of the state's Negro enrollment. Tennessee ranks second in the area with 16 per cent and Virginia third with 11 per cent. Three states—Alabama, Louisiana, and Mississippi—continue to have less than one per cent of their Negro enrollment attending schools with whites. The other Southern states—Arkansas, Florida, Georgia, North Carolina and South Carolina—vary between 1 and 10 per cent of their Negro students in biracial classrooms.

All but one of the border states have more than half of their Negro enrollments in desegregated schools. Oklahoma has 38 per cent of its Negroes in biracial schools, Maryland has 56 per cent, and Delaware, the District of Columbia, Kentucky, . . . Missouri and West Virginia have desegregated more than three-fourths of their Negro student population. . . .

The desegregation statistic showing the sharpest increase this year was the number of districts with desegregation policies. The region now has 4,804 public school districts that have received approval from the U. S. Office of Education for their desegregation proposals. When the last school year ended, SERS reported that 1,476 districts had desegregated in practice or in policy.

TABLE III

Status of Desegregation

(17 Southern and Border States and D.C.)

	School Districts				Enrollment		Negroes in Schools with Whites	
	Total	With Negroes and Whites	In Compliance†	Not in Compliance†	White	Negro	No.	%††
Alabama	118	119	105	14	559,123**	295,648**	1,250*	.43
Arkansas	410	217	400	10	337,652**	111,952**	4,900*	4.38
Florida	67	67	67	0	1,056,805*	256,063*	25,000*	9.76
Georgia	196	180	192	5	784,917*	355,950*	9,465*	2.66
Louisiana	67	67	33	34	483,941	318,651	2,187	.69
Mississippi	149	149	118	31	309,413	296,834	1,750*	.59
North Carolina	170	170	165	4	828,638**	349,282**	18,000*	5.15
South Carolina	108	108	86	21	374,007	283,983	3,864	1.46
Tennessee	152	129	149	2	714,241*	176,541*	28,801	16.31
Texas	1,325	850	1,303	7	2,136,150*	349,192*	60,000*	17.18
Virginia	130	127	124	12	757,037**	239,729**	27,550*	11.49
SOUTH	2,892	2,183	2,742	140	8,341,924	3,014,025	182,767	6.01
Delaware	86	47	59	0	86,041	20,485	17,069	83.32
Dist. of Columbia	1	1	1	0	15,173	128,843	109,270	84.81
Kentucky	200	167	204	0	713,451**	59,835**	46,891	78.37
Maryland	24	23	24	0	583,796	178,881	99,443	55.60
Missouri	1,096	212*	675	0	843,167	105,171	79,000*	75.12
Oklahoma	1,048	322	1,044	4	564,250*	45,750*	17,500*	38.25
West Virginia	55	44	55	0	425,087*	19,850*	15,850*	79.85
BORDER	2,480	817	2,062	4	3,230,965	558,785	385,022	68.90
REGION	5,372	3,000	4,804	144	11,572,889	3,572,810	567,789	15.89

* Estimated.
** 1964-65.
† The sum of adding the districts "In Compliance" and "Not in Compliance" will not always equal the total number of districts because the Office of Education reports a different number of districts from that of some of the state departments of education.
†† The number of Negroes in schools with whites, compared to the total Negro enrollment.

COX, District Judge, dissenting:

The majority opinion herein impels my dissent, with deference, to its general theme, that precedent required the public schools to mix the races rather than desegregate such schools by removing all effects of state action which may have heretofore compelled segregation, so as to permit these schools to be operated upon a proper free choice plan. This Court has heretofore firmly and soundly (as decision and not gratuitously) committed itself to the views expressed by the distinguished jurists in *Briggs v. Elliott*, 132 F. Supp. 776. The majority now seeks to criticize the *Briggs* case and disparage it as dictum, although this Court in several reported decisions has embraced and adopted *Briggs* with extensive quotations from it as the decisional law of this Circuit. Surely, only two of the judges of this Court may not now single-handedly reverse those decisions and change such law of this Circuit.

These school cases all stem from the decision of the Supreme Court of the United States in the familiar *Brown* cases.[1] Nothing was said in those cases or has since been said by the Supreme Court to justify or support the extremely harsh plan of enforced integration devised by the majority decision. Signifi-

[1] Brown I *Brown v. Board of Education of Topeka*, 347 US 483, 74 S.Ct. 686, 98 L.Ed. 873.
Brown II *Brown v. Board of Education of Topeka, Kansas*, 349 US 294, 75 S.Ct. 753, 99 L.Ed. 1083.
On December 6, 1965 in *Patricia Rogers, et al v. Edgar F. Paul, et al*, 382 US 198, 86 S.Ct. 358, the Court decried delays in desegregation of public schools and called for an acceleration of the process, but neither said nor intimidated the existence of any power or the justification for any authority to forcefully mix or integrate these schools.

cantly, there is nothing in the Civil Rights Act of 1964 to suggest the propriety of this Court adopting and following any guidelines of the Health, Education and Welfare Commissioner in these school desegregation cases in such respect. The policy statement of Congress as contained in the act itself expressly disclaims any intention or purpose to do that which these guidelines, and the majority opinion approving them, do in complete disregard thereof.

No informed person at this late date would now argue with the soundness of the philosophy of the *Brown* decision. That case simply declared the constitutional right of negro children to attend public schools of their own free choice without any kind of restraint by state action. That Court has made it clear that the time for "deliberate" speed in desegregating these public schools has now expired, but the majority opinion herein is the first to say that the *Brown* case, together with the Civil Rights Act of 1964, makes it necessary that these public schools must now integrate and mix these schools and their facilities, "lock, stock and barrel." That view comes as a strange construction of the Fourteenth Amendment rights of colored children. The passage of time since the rendition of the *Brown* case; and of natural disparities which are found in so many school plans before the Court; and the difficult problems posed before the Court by such plans certainly can provide no legal justification or basis for this extreme view and harsh and mailed fist decision at this time. These questions involving principles of common sense and law are

readily resolved by a court of equity without being properly accused of giving an advisory opinion. The decision in such case is not overtaxing on a court of equity and its articulated conclusions can be implemented by an enforceable decree even at the expenditure of some well spent time, patience and energy of the Court. If a Court is to write a decree, it should be the decree of that Court and not the by-product of some administrative agency without knowledge or sworn obligation to resolve sacred constitutional rights and principles. Unilaterally prepared guidelines allegedly devised by the Commissioner may or not accord with his own views, but such an anomalously prepared document could not justify this Court in adopting it "lock, stock and barrel" under any pretext and even with repeated disavowals of such intention or purpose.

The Constitution of the United States is not the dead hand of the past strangling the liberties of a free people; it is a living document designed for all time to perpetuate liberty, freedom and justice for every person, young or old, who is born under or who comes within its protecting shield. As was said many years ago, "in moving water there is life, in still waters there is stagnation and death." The Constitution was framed not for one era, but for all time. But when the Courts transform viability into elasticity, constitutional rights are illusory. The rope of liberty may be twisted and become a garrote which strangles those who seek its protection. If the majority opinion in these cases is permitted to stand, it will, in the name

of protecting civil rights of some, destroy civil rights and constitutional liberties of all our citizens, their children and their children's children.

The Supreme Court, in *Brown II*, said that "school authorities have the primary responsibility for elucidating, assessing and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles." It thereupon became the duty of the Court, acting as a Court of Equity, under such principles to see that public schools, still operating under the dual system by state action, were *desegregated* (not integrated) in accordance with the vested constitutional right of colored children. Judicial haste and impatience cannot justify this Court in equating integration with desegregation. No Court up to this time has been heard to say that this Court now has the power and the authority to force integration of both races upon these public schools without regard to any equitable considerations, or the will or wish of either race. The decisions of this Court deserve and must have stability and integrity. It was the 1965 guidelines of HEW that were approved by this Court in *Derek Jerome Singleton v. Jackson Municipal Separate School District*, 255 F.2d 865. Judge Wisdom wrote for the Court and Judge Thornberry concurred in that case on January 26, 1966; and there was not a word in that case to the effect that this Court then thought that any decision or statute or guidelines under any statute required or justified *forced integration*. Almost before that slip

opinion reached the bound volume, this Court has now written on December 29, 1966, a vastly different opinion with no change intervening in the law.

The last reported school case from this Circuit, decided August 16, 1966 by Judge Tuttle and Judge Thornberry in *Birdie Mae Davis, et al v. Board of School Commissioners of Mobile County, et al,* 364 F.2d 896, this Court still wrote of accelerating a plan of *desegregation.* As if to foreshadow the point of Judge Wisdom's "nettle" in the majority opinion in this case, Judge Tuttle wrote in his Note 1 an explanation of his changing requirements in these school cases for the delayed enjoyment of constitutional rights by accelerating *desegregation.* Davis said that negro children, as individuals, had the right to transfer to schools from which they were excluded because of their race, and said that this had been the law since the *Brown* decision; but that misunderstanding of that principle was perhaps due to the popularity "of an oversimplified dictum that the Constitution does not require integration, Briggs v. Elliott, 132 F. Supp. 776, 777." That is the first and only expressed criticism of Briggs found among the decisions of this Circuit, but the Court did not comment upon the viability and soundness of the many decisions of this Circuit which wholeheartedly embraced and repeatedly reaffirmed the so-called dicta in *Briggs. Davis* dealt with an urban area in Mobile, Alabama, while these cases deal with small communities or rural schools but that could have no possible bearing on desegregation versus or as distinguished from immediate forced integration or mixing of these schools.

In *Alfred Avery, Jr., a Minor by his Mother and Next Friend, Mrs. Alfred Avery, et al v. Wichita Independent School District, et al*, 241 F.2d 230 (1957), this Court said:

"The Constitution as construed in the School Segregation Cases, Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873; Id., 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, and Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884, forbids any state action requiring segregation of children in public schools solely on account of race; it does not, however, require actual integration of the races. As was well said in Briggs v. Elliott, D.C.E.D.S.C., 132 F. Supp. 776, 777:

"'* * * it is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different

churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals."

Again, this Court in *Hilda Ruth Borders, a Minor, et al v. Dr. Edwin L. Rippy, et al,* 247 F.2d 268 (1957) said: "The equal protection and due process clauses of the Fourteenth Amendment do not affirmatively command integration, but they do forbid any state action requiring segregation on account of their race or color of children in the public schools. Avery v. Wichita Falls Independent School District, 5 Cir., 1957, 241 F.2d 230, 233. Pupils may, of course, be separated according to their degree of advancement or retardation, their ability to learn, on account of their health, or for any other legitimate reason, but each child is entitled to be treated as an individual without regard to his race or color."

In a public housing case, participated in by Judge Wisdom, *Queen Cohen v. Public Housing Administration,* 257 F.2d 73, it is said: "Neither the Fifth nor the Fourteenth Amendment operates positively to command integration of the races, but only negatively to forbid governmentally enforced segregation."

This Court in *Sandra Craig Bcson, et al v. Dr. Edwin L. Rippy, et al,* 285 F.2d 43, said: "Indeed, *this Court has adopted the reasoning* in Briggs v. Elliott, DC.E.D.S.C. 1955, 132 F. Supp. 776, relied on by the Sixth Circuit, and has further said: 'The equal protection and due process clauses of the fourteenth amendment do not affirmatively command integration, but they do forbid any state action requiring segregation on account of their race or color of children in the public schools. Avery v. Wichita Falls Independent School District, 5 Cir., 1957, 241 F.2d 230, 233. Pupils may, of course, be separated according to their degree of advancement or retardation, their ability to learn, on account of their health, or for any other legitimate reason, but each child is entitled to be treated as an individual without regard to his race or color.' Borders v. Rippy, 5 Cir., 1957, 247 F.2d 268, 271.

"Nevertheless, with deference to the views of the Sixth Circuit, it seems to us that classification according to race for purposes of transfer is hardly less unconstitutional than such classification for purposes of original assignment to a public school." It is that decision in *Briggs v. Elliott, supra,* which the majority here now seek to criticize and repudiate.

In *Ralph Stell, et al v. Savannah-Chatham County Board of Education, et al,* (5CA) 333 F.2d 55, 59, in footnote 2 it is said: "No court has required a 'compulsory racially integrated school system' to meet the constitutional mandate that there be no discrim-

ination on the basis of race in the operation of public schools. See Evers v. Jackson Municipal Separate School District, 5 Cir., 1964, 328 F.2d 408, and cases there cited. The interdiction is against enforced racial segregation. Incidental integration, of course, occurs through the process of desegregation. Cf. Stone v. Board of Education of Atlanta, 5 Cir., 1962, 309 F.2d 638."

This Court in *Darrell Kenyatta Evers, et al v. Jackson Municipal Separate School District*, 328 F.2d 408 (1964) said: "This is not to say that the Fourteenth Amendment commands integration of the races in the schools, or that voluntary segregation is not legally permissible. See Avery v. Wichita Falls Ind. School Dist., 5 Cir., 1957, 241 F.2d 230; Rippy v. Borders, 5 Cir., 1957, 250 F.2d 690; Cohen v. Public Housing Administration, 5 Cir., 1958, 257 F.2d 73, cert. den., 358 U.S. 928, 79 S.Ct. 315, 3 L.Ed. 2d 302; Holland v. Board of Public Instruction, supra; and Shuttlesworth v. Birmingham Board of Education, supra. The Supreme Court did not hold otherwise in Brown v. Board of Education, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873." The same teaching is expressed in a park case from this Court, styled *City of Montgomery, Alabama v. Georgia Theresa Gilmore*, 277 F.2d 364. In the many cases from this Court involving the race issue in public schools (there being some forty-one of them according to the majority opinion), not one of them speaks of any requirement or duty of the school to forcefully integrate the races, or to compel the races to mix with each other in public schools; but every

one of them speak of *desegregating* such schools. The word desegregate does not appear in Webster's New International Dictionary, Second Edition, Edited in 1950. But Webster's New Collegiate Dictionary (a Merriam-Webster) defines *desegregation* as: "To free itself of any law, provision or practice requiring isolation of the members of a particular race in separate units, especially in military service or in education."

In sum, there is no law to require one of these public schools to integrate or force mix these races in public schools. But these public schools, which have been heretofore segregated by state action, and operate under a dual system, should be required to remove every vestige of state influence toward segregation of the races in these schools; and these colored children should be fully advised of their constitutional right to attend public schools of their choice, completely without regard to race. Many problems exist and are created by the proper enforcement of desegregation plans that will assure a full sweep of real freedom of choice to these negro children, and this Court cannot by only two of its members become impatient as trail-blazers and rewrite the decisional law of this Circuit as my good friends have undertaken to do in this case.

Such a course would do violence to the ancient rule of Stare Decisis. In *Donnelly Garment Co. v. National Labor Relations Board*, (8CCA) 123 F.2d 215: "It is a long-established rule that judges of the same court

will not knowingly review, reverse or overrule each other's decisions. Shreve v. Cheesman, 8 Cir., 69 F. 785, 790, 791; Plattner Implement Co. v. International Harvester Co., 8 Cir., 133 F. 376, 378, 379. The necessity of such a rule in the interest of an orderly administration of justice is clear." In *Sanford Napoleon Powell v. United States*, (7CA) 338 F.2d 556 (1964), it is said: "Our decision in Lauer has been criticized. However, this decision is the law of this Circuit unless and until this Court (presumably sitting en banc) would determine otherwise or unless higher authority might so determine."

Rule 25(a) of the Fifth Circuit provides for a rehearing in any case upon vote of a majority of the circuit judges in active service for any reason which appears to them to be sufficient in the particular case. Ordinarily, a hearing or rehearing en banc is not ordered except "when necessary to secure or maintain uniformity or continuity in the decisions of the court, etc." The majority opinion simply does not reflect the well considered and firmly stated composite decision of this Circuit; and in that view, is not an accurate or proper statement of the law in this case as it now exists in the Fifth Circuit.

The Civil Rights Act of 1964 (42 U.S.C., 1958 ed., §2000c-6) refers to "desegregation in public education" and not to forced mixing or integration of the races. That same section states "provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve

a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards." The English language simply could not be summoned to state any more clearly than does that very positive enactment of Congress, that these so-called "guidelines" of this administrative agency are not sacrosanct expositions of school law (if so intended), but are actually promulgated and being used in opposition to and in violation of this positive statute. Contrary to the majority opinion, it was never the intention or purpose of the Congress to constitute the Commissioner of Health, Education and Welfare as the sidewalk superintendent of this Court in these school cases. On the contrary, 42 U.S.C., 1958 ed., §2000c-2 provides that the Commissioner, *only upon application* of a *school board, state, municipality, school district* or *other governmental unit,* can render any technical assistance to such an applicant. Nowhere in that act is it contemplated that this court should abdicate its power and authority to act upon and decide a case on appeal to it as a court of equity, and simply decide it by rubber stamping one of the annual guideline bulletins of an administrative bureau of the United States in Washington. The attitude and position of this Court in doing exactly that in this case is not improved by disavowing any intention or purpose to do so.

There were seven consolidated cases before the Court which are embraced in this decision. Most, if not all, of the plans in those cases were defective and needed updating for a more realistic and effective application of the free choice principle under the former decisions of this Court; but they did not need or deserve the harsh and unprecedented treatment accorded these schools by the majority decision in these cases. The colored children are not befriended and their lot is not improved by this unprecedented majority opinion and the entire school system will suffer under the impact of this improvident administrative directive as thus adopted by this Court.

My duty impels me to file this DISSENT to the majority view in these cases with great deference to both of my distinguished associates.

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